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In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-5774

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC.; AMERICAN FRIENDS SERVICE COMMITTEE; EL RESCATE ("THE RESCUE"); UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, LOCAL 645; CENTRAL AMERICAN REFUGEE CENTER (CARECEN); EL CONCILIO MANZO; WILLAMETTE VALLEY IMMIGRATION PROJECT, PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND NATURALIZATION SERVICE; ALAN NELSON, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California

Argued and Submitted Sept. 19, 1989
Decided Sept. 7, 1990

Before: FERGUSON, REINHARDT and TROTT, Circuit Judges.

FERGUSON, Circuit Judge:

This appeal concerns regulations promulgated in 1983 by the Immigration and Naturalization Service (INS), which imposed a condition against employment in appearance and delivery bonds of aliens awaiting deportation hearings. This is the third appeal to this court regarding this matter. Our earlier opinions, 743 F.2d 1365 (9th Cir. 1984), 791 F.2d 1351 (9th Cir. 1986) were vacated and remanded for further consideration in light of the Immigration Reform and Control Act of 1986 (IRCA). 481 U.S. 1009 (1987). On remand, the district court reiterated its earlier holding that the regulations were not authorized by the statute, and further held that the Attorney General's power to impose the blanket bond condition had not been modified or increased by the Immigration Reform and Control Act of 1986. The Immigration and Naturalization Service appeals the district court's grant of summary judgment in favor of the National Center for Immigrants' Rights, Inc. and other plaintiffs. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1983, the INS promulgated regulations which stated in part: "[a] condition against employment shall be included in an appearance and delivery bond in connection with a deportation proceeding. . . ." 8 C.F.R. 103.6(a)(2)(ii) (1988). The previous regulations had provided that, in his discretion and with the prior approval of the INS Regional Commissioner, the District Director could include a condition barring "unauthorized employment" in individual appearance and delivery bonds based on consideration of many factors; a non-exclusive list of nine factors was included in the regulation. 8 C.F.R. § 103.6 (a)(2)(ii), (3)(iii) (1983).

One day before the regulations went into effect, an injunction was sought by the National Center for Immigrants Rights and a group of other nonprofit organizations, a local affiliate of the United Auto Workers Union, and individuals in deportation proceedings ("NCIR"). Ten days later, after hearing evidence and testimony, the district court granted a preliminary injunction against enforcement of the regulation. The INS appealed to this court, challenging the jurisdiction of the district court, the grant of the preliminary injunction, and the failure to certify a class. *National Center for Immigrants Rights v. I.N.S.*, 743 F.2d 1365 (9th Cir. 1984). We held that the district court had jurisdiction and affirmed the injunction, but we remanded for class certification. *Id.*

On remand, the district court certified a class of "all those persons who have been or may in the future be denied the right to work pursuant to 8 C.F.R. § 103.6." The INS moved for summary judgment, stating that no issue of material fact existed and that they were entitled to judgment as a matter of law. The district court granted summary judgment in favor of the NCIR, holding the regulations invalid because the discretion granted to the Attorney General under the Immigration and Naturalization [*sic*] Act must be limited to those conditions which are related to securing the alien's presence at future deportation hearings. *National Center for Immigrants' Rights v. I.N.S.*, 644 F.Supp. 5 (C.D. Cal. 1985). The Attorney General's discretion could not extend to the blanket imposition of a no-work condition on all aliens released on bond pending future deportation proceedings. *Id.* at 11.

The INS appealed, again challenging jurisdiction and arguing that the Attorney General had statutory

authority to impose any condition in a bond that he deemed necessary to carry out the provisions of the act. *National Center for Immigrants' Rights v. I.N.S.*, 791 F.2d 1351 (9th Cir. 1986). We again upheld jurisdiction, *id.* at 1353-54, and affirmed the summary judgment, *id.* at 1354-56. The INS sought certiorari. In 1986, Congress enacted the Immigration Reform and Control Act (IRCA). 8 U.S.C. § 1324a et seq. The Supreme Court granted certiorari, vacated the judgment, and remanded for further consideration in light of IRCA. 481 U.S. 1009 (1987). We remanded to the district court for this consideration. 818 F.2d 869 (9th Cir. 1987).

The district court requested additional briefing from the parties on the effect of IRCA on the condition imposed by the regulation. The court found that, although IRCA was concerned with the impact of the employment of undocumented workers on the American workforce, IRCA had not conferred upon the Attorney General the authority to impose a blanket no-work rider on appearance and delivery bonds. Incorporating portions of the analysis from its earlier opinion, the court again granted summary judgment in favor of the plaintiffs. The INS timely appealed the district court's reaffirmance of summary judgment.

JURISDICTION

The INS again challenges the jurisdiction of the district court, reasserting its position that review is only available on habeas corpus under 8 U.S.C. § 1252 (a)(1).[1] As we held previously, § 1252(a)(1) deals

[1] The statutory provision states in part:

> Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

8 U.S.C. § 1252(a)(1).

only with complaints about delays in determining deportability in individual cases. In *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1032-33 (11th Cir. 1982), *disapproved on other grounds, Jean v. Nelson*, 727 F.2d 957, 976 n. 27 (11th Cir. 1984) (en banc), the court distinguished between jurisdiction to rule on the merits of an individual deportation order and jurisdiction to rule on a pattern and practice of constitutional violations. *See also Flores v. Meese*, 913 F.2d 1315, 1318-1319 (9th Cir. 1990); *Salehi v. District Director, I.N.S.*, 796 F.2d 1286, 1290 (10th Cir. 1986); *Jean v. Nelson*, 727 F.2d at 979-981 (statutory as well as constitutional questions), *aff'd*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) (expressing no view on jurisdictional issues); *cf. Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989) (no jurisdiction in district court for review of legalization decisions under IRCA). The district court had jurisdiction since NCIR challenged the blanket provision on constitutional and statutory grounds and did not seek a review on the merits of any individual determination regarding release on bond.[2]

[2] During this appeal, the NCIR also raised a "suggestion of lack of jurisdiction," relying on *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), which we rejected, 892 F.2d 814 (9th Cir.1989). The notice of appeal gave sufficient notice that all of the defendants sought to appeal. 892 F.2d at 816-17.

STANDARD OF REVIEW

Our prior judgments in this case were vacated when the Supreme Court remanded for consideration in light of IRCA. The district court incorporated portions of its earlier order by reference, considered the impact of IRCA, and reaffirmed its grant of summary judgment. When summary judgment is granted to the nonmoving party, the question is whether the moving party had an opportunity to fully and fairly litigate the issues. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982). Here, the district court received evidence and heard testimony. The INS twice sought a decision on the merits of this issue, first in our initial review of the preliminary injunction, 743 F.2d at 1369, and then with its motion for summary judgment in the district court, 644 F.Supp at 6. On remand, when providing additional briefing on IRCA, the INS raised no suggestion that any additional litigation was needed. We review the grant of summary judgment de novo, *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), to determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

I. THE IMPACT OF THE REGULATION

The challenged regulation states that a "condition *barring employment shall be* included in an appearance and delivery bond in connection with a deportation proceeding. . . ." 8 C.F.R. § 103.6(a)(2)(ii) (1990) (emphasis added). During this litigation, basic questions concerning the nature, scope, and im-

pact of the regulation have been subject to debate: (a) whether the condition bars "employment" or only "unauthorized employment"; (b) whether it applies only to those who are unauthorized to work in any event; (c) whether it implicates only work or also freedom from detention; and (d) whether it is a "blanket condition" or affords individualized determinations which merely shift the burden of proof regarding work authorization. We examine each of these in turn before turning to our analysis of the statutory authority for the regulations.

A. "EMPLOYMENT" OR "UNAUTHORIZED EMPLOYMENT"

The INS asserts that the regulation only bars "unauthorized employment." The INS has used both terms—"employment" and "unauthorized employment"—at different times, though not quite interchangeably. In the text of the regulation and when put into operation on the face of the bonds, the condition refers broadly to "employment."

The text of the subsection describes a "condition *against employment*." 8 C.F.R. § 103.6(a)(2)(ii) (emphasis added). The caption appearing above this provision is more limited: "Condition against *unauthorized* employment" (emphasis added). The meaning lies in the text of the regulation. "[T]he heading of a section cannot limit the plain meaning of the text." *Railroad Trainmen v. B. & O.R. Co.*, 331 U.S. 519, 528-29, 67 S.Ct. 1387, 1392, 91 L.Ed. 1646 (1947) (statutory interpretation). *See also Nordby Supply Co. v. United States*, 572 F.2d 1377, 1378 (9th Cir.), *cert. denied*, 439 U.S. 861, 99 S.Ct. 182, 58 L.Ed.2d 170 (1978).

The discrepancy could be accidental, but a comparison with the previous regulation shows that the use of the term "employment" is deliberate. The previous regulation, which had the same caption, read: "In the discretion of the district director and with the prior approval of the regional commissioner, a condition barring *unauthorized* employment may be included in an appearance and delivery bond in connection with a deportation proceeding." 8 C.F.R. 103.6 (a)(2) (1983) (emphasis added). The change from the previous regulation demonstrates an intentional shift when the regulation was rewritten. Similarly, in the notice accompanying the final rule, the INS repeatedly referred to this condition as a "no-work rider." 48 Fed. Reg. 51142-43 (Nov. 7, 1983). When the condition itself was discussed, rather than the justification for its enactment, it was generally described as barring "employment" and only occasionally as barring "unauthorized employment." *Id.*[3]

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[3] The text refers fifteen times to a "no-work" rider or to a condition "barring employment" or "against employment." *Id.* at 51142-43. In contrast, the phrases "unauthorized work" or "working without authorization" appear five times: twice in describing the problem of unauthorized work by aliens in deportation proceedings (not the condition), once in relation to employment as the violation for which the alien is apprehended; once in a quotation, and once in describing the reasonableness of the bond condition. *Id.* at 51142. The bond condition is also described as barring "unauthorized employment" twice, including once in the same sentence which describes a "condition barring employment." *Id.* Some of these shifts in terminology arise because of an emphasis on the Attorney General's discretion to grant employment authorization under a regulation now codified at 8 C.F.R. § 274a.12 (c)(13), discussed *infra*.

Finally, the language of the bond condition itself explicitly bars employment.[4] The INS Operating Instruction issued pursuant to the regulation was stayed by the injunction in this case. OI 103.6(i), Court Record at 44, Exhibit A. The Operating Instruction states: "where a condition against unauthorized employment is effective, the order to show cause shall be stamped 'Bond-*Employment Not Authorized.*'" *Id.* (emphasis added). The text of the Operating Instruction refers to this condition as "prohibiting unauthorized employment." *Id.* But it is the bond condition itself which will be seen and relied upon by the individuals to whom it is applied, employers, and the authorities who decide whether the condition has been violated—and this condition bars "employment."

The language of the bond condition, however, cannot be isolated from the context in which it is applied. This is the *same* language which appeared in the prior Operating Instruction, written under the previous regulation specifying "unauthorized employment," in which the determination as to its imposition on bonds was made in individual cases by the District Director with the approval of the Regional Director. OI 103.6i "Appearance and Delivery Bond", *reprinted in* Gordon & Mailman, Immigra-

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[4] In response to questions at oral argument regarding the exact language to be used in the bond condition, both sides submitted uncertified copies of documents. One document was irrelevant since it was drafted under the prior regulation. We decline to take judicial notice of these documents. The language of the instruction is part of the record in this case, since it appears in a certified copy of the INS Operating Instruction which was the sole exhibit in the Motion for Summary Judgment made by the INS. Court Record at 44, Exhibit A.

tion Law and Procedure, Rev.Ed., 2 Appendix, Operations Instructions, at 23-65. Therefore the question of whether this condition bars "employment" or merely "unauthorized employment" is not separate from the determination of the individuals to whose bonds it will be applied.

B. INDIVIDUALS SUBJECT TO THE BOND CONDITION

Individuals are arrested by the INS upon a "prima facie" showing of deportability, *Abel v. United States*, 362 U.S. 217, 232, 80 S.Ct. 683, 693, 4 L.Ed.2d 668 (1960), or of probable cause, *see Int'l Molders & Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 552 (9th Cir. 1986). Most take voluntary departure, *see INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044, 104 S.Ct. 3479, 3486, 82 L.Ed.2d 778 (1984) (97.5% of illegal aliens arrested by the INS agree to voluntary departure without a hearing); some are released on parole, *see* 8 U.S.C. § 1252(a)(1).

For all those released on bond while awaiting determinations of deportability, the regulation imposes a "condition against employment" on *all* appearance and delivery bonds; it is not limited by status, work authorization, or the reasons deportation is sought. In the final notice promulgating the rule, the only limitation asserted was that the INS would not apply the rule to permanent resident aliens.[5] 48 Fed.Reg.

[5] The final notice states that the work authorization of those who have filed a non-frivolous application for asylum is governed by a different regulatory section (now consolidated at 8 C.F.R. 274a.12(c)), but it does not state that the provision barring employment will not be applied to bonds for these aliens. 48 Fed.Reg. 51143.

51143. The INS Operating Instruction states: "Individuals maintaining a colorable claim to U.S. Citizenship and permanent resident aliens . . . shall not be subject to this general prohibition until such time as a final administrative determination of deportability has been made," OI 103.6(i), Court Record at 44, Exhibit A. The language of the Operating Instruction implicitly claims the capacity to apply the bond condition to all and therefore supports a literal reading of the regulation. Even if the condition is not applied to permanent residents or to those with a "colorable claim of citizenship,"[6] all other appearance and delivery bonds are included in the mandatory language of the regulation.

If these exceptions were observed, the condition would still be imposed on all other appearance and delivery bonds. 8 C.F.R. § 274a.12 lists the categories in which individuals may be authorized to work. Besides permanent residents, there are ten other categories of aliens who are authorized to work

[6] The instruction provides no procedures for discovering or distinguishing a "colorable" claim. In *Agosto v. I.N.S.*, 436 U.S. 748, 755 n. 5, 98 S.Ct. 2081, 2086 n. 5, 56 L.Ed.2d 677 (1978), the Supreme Court noted the uncertainties accompanying this term. The laws governing the acquisition and retention of citizenship are extremely complex. *See generally* Gordon and Mailman, *Immigration Law and Procedure*, Sections 13.3-13.9A. (Noting "frustrating difficulties often presented by such assessments," *id.* at 13-39; "[C]onstant changes in the prescribed conditions have transformed a relatively simple inquiry into one which often is exceedingly and unnecessarily complex," *id.* at 13-38 to 13-39.) Because of this complexity, some people may not know they are citizens unless they receive legal advice. The INS has pointed to no procedure to help detect such individuals. Absent such inquiry, this may really be protection only for individuals who already know they have a "colorable claim of citizenship."

incident to their status and need no authorization from the INS. These include aliens granted asylum, non-immigrant fiances, or parents and dependent children of permanent residents, among others. Section 274a.12(b) lists sixteen categories of aliens authorized for employment with a specific employer incident to status, who also need not seek work authorization from the INS. These include temporary workers, nonimmigrant students employed less than 20 hours per week when school is in session, and treaty traders, among others.

Finally, § 274a.12(c) lists fifteen categories of aliens whose authorization for work is granted by the INS, including nonimmigrant students seeking off-campus employment, applicants for asylum or suspension of deportation—as well as aliens in deportation or exclusion proceedings who would be subject to the condition against employment but could apply for work authorization through the District Director. For those in § 274a.12(c), employment authorization automatically terminates upon the initiation of deportation or exclusion proceedings. § 274a.14(a)(1)(ii). They may then reapply for work authorization *if they are not in detention* under § 274a.12(c)(13). Approval is discretionary except for aliens who apply for asylum. § 274a.13(a). The INS has up to 60 days to make its decision. § 274a.13(d).

On appeal, the INS asserts that anyone who has work authorization can easily establish this fact. The plain language of the regulation and the agency's interpretation of it in the final notice and operating instruction show that these individuals are not protected from some interruption in their capacity to work, even if matters can be corrected later. The challenged regulation and the agency's interpretation

of it show the bond condition would apply to all those who post bond while awaiting deportation proceedings, including aliens who have never had work authorization or legal status and those described above who have many different types of authorization and status, with the possible exception of permanent residents and individuals whose claims of citizenship appear "colorable" to the INS.

On appeal, the INS says that it will not apply the provision to anyone who has work authorization. But the mandatory and sweeping language of the bond rider does not distinguish aliens of different status. Justice Douglas, sitting as Circuit Justice for the Ninth Circuit, once addressed a similar argument regarding a bond condition barring association with any Communist: "On oral argument the Department of Justice says that the language would not, as a matter of administrative practice, be construed that way. But there is a broad sweep to the language that would permit another ruling on a different day." *Yanish v. Barber*, 73 S.Ct. 1105, 1108, 97 L.Ed. 1637 (1953) (Douglas, J., in chambers).

C. DETENTION AND WORK

Also at issue is the interest at stake in this regulation: is it merely a prohibition against work, or an expanded exercise of detention? The INS claims absolute power to detain if there are grounds for arrest as a deportable alien; any release at all is "a matter of grace." This argument assumes what it must prove: work becomes the sole issue *only* if the authority to detain is unlimited. Detention cannot be effectively distinguished from a work-related condition on release, since both the regulation and the notice which promulgated it explicitly show that the

bond condition links detention with refraining from work. Since "[a] condition barring employment *shall be imposed*" on bonds, 8 C.F.R. § 103.6(a)(2)(ii) (emphasis added), those who do not accept the condition are subject to continued detention.

In addition, when the INS promulgated the final rule on this regulation in the Federal Register, it specifically distinguished the "no-work" condition from a money bond. 48 Fed.Reg. 51142. The purpose of a money bond is to insure the alien's appearance. The violation of a condition barring employment would not lead to forfeiture of the money. "Where the 'no work' condition is violated, the appropriate response would be to take the alien into custody. . . . Rather [than being tied to the money bond], 'no work' is a condition of release which, if violated, gives the Service the right to order the alien to surrender and appear." *Id.* If the alien failed to appear, the bond would then be declared in default. *Id.* This discussion, offered to reassure commenters who feared the money bond would be subject to forfeit merely for the act of working, explicitly demonstrates that detention will be the result if the alien works. It further clarifies this connection by separating these issues from the link between the money bond and the appearance of the alien. During appeal as well, even while attempting to distinguish detention from a bond condition regarding employment, the INS has repeatedly stated that the alien would be detained if the condition were violated.

While the INS has attempted throughout the course of this litigation to characterize the regulation as a bond condition with respect to employment, in practice it recognizes that if the regulation were implemented, the result would be an increase in the

number of aliens detained. The INS has stated that "[t]he possibility that a bonding company might require more collateral or charge higher premiums was also considered. As a corollary of these possibilities, it was also assumed that more aliens might have to be detained. This latter possibility was considered an acceptable consequence." 48 Fed.Reg. 51143 (1983). The plaintiffs, in their Exhibits and Supplemental Exhibits, contended that bonding companies may, in response to the imposition of the no-work condition on the bond, refuse to underwrite immigration bonds entirely or charge significantly higher premiums which most aliens will not be able to afford. The INS did not contest these claims. Rather, it agreed that bonding companies may change the manner in which they conduct business, resulting in an increase in the number of those detained: "Plaintiffs might be correct in speculating that the new regulations will make it more difficult for many persons to bond out of detention." Thus, the proposed regulation, while facially concerned with employment, will in fact result in the detention of a significant number of aliens.[7]

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[7] The plaintiffs, in their Exhibits and Supplemental Exhibits, outline the dimensions of the problem. It is unclear whether bonding companies will underwrite bonds with a no-work condition stipulated on the face of the bond. The declarations of bondsmen working in this field suggest that the answer is "no," and the INS has not contested the assertions made to this effect in many of the plaintiffs' declarations. Generally, aliens in deportation proceedings lack the financial resources to enable them to post any significant portion of their bond. The frequently borrow funds from relatives or friends, and with these amounts, contract with a bonding company to put up the full bond with the INS; their relatives or friends then serve as guarantors. Raul Atler, a bondsman at a Los Angeles bond company which bails out persons

Although people subject to this condition are differently situated with regard to work, they are simi-

undergoing deportation proceedings, declared under penalty of perjury that in his discussion with other immigration bond people, "most state that they will not place bonds with INS in deportation cases if the client is prohibited from working as a condition of the bond. Some will stop writing immigration bonds when the 'no work' bond condition goes into effect." Michael Hernandez, another Los Angeles bondsman who has discussed this issue with representatives of bonding companies in California and other states, concurred with Alter's assessment. The unwillingness of bonding companies to write immigration bonds with a no-work condition is a nationwide problem. Fourteen declarations by directors of pro bono legal services and immigration attorneys throughout the country have stated that bonding companies have made it clear to them that they will not place bonds with the INS, except in rare cases, if a condition of the bond prohibits the client from employment. Many bonding companies simply "will not put up collateral for an individual who is not allowed to work to pay off that bond." Enforcement of the regulation would have enormous implications in regions outside of the major metropolitan areas. The director of the Willamette Valley Immigration Project in Oregon found that "out-of-state bonding companies who ordinarily write immigration bonds will refuse to do so where a 'no-work' rider has been imposed. These companies represent the only alternative source of bond, since no such companies exist in Oregon." With bonding companies unwilling to place bonds with the INS, or willing to do so only by charging a substantially higher rate, a larger number of aliens will be unable to bond out and will simply remain in detention until their applications for withholding of deportation or for asylum are resolved.

Furthermore, relatives or friends may be more reluctant to serve as guarantors of an immigration bond which prohibits employment on its face. They may believe, correctly or incorrectly, that there is a greater likelihood that the bond would be forfeited. Thus, the no-work condition may deter potential guarantors; in fact, in at least one case, according

larly situated with regard to detention. The challenged regulation permits application for work authorization under another regulation, now recodified at 8 C.F.R. 274a.12(c)(13), if "compelling reasons" are shown. 8 C.F.R. 103.6(a)(2)(iii). However, under 8 C.F.R. 274a.12(c)(13), the alien cannot apply for this relief while he or she is detained. Application for authorization to work is dependent upon release from detention; release from detention is conditioned upon the promise not to work. Both detention and work are at stake here.

D. THE BURDEN OF PROOF AND PRESUMPTIONS

Finally, the parties dispute whether this is a "blanket provision" or a system of individualized determinations in which the burden has been shifted to create a presumption that work is unauthorized. We note that there are really two presumptions: first, that affected individuals can be detained, either absolutely or conditionally upon refraining from employment, and second, that they lack work authorization. The INS has done more than shift the "burden" of proving work authorization. It has added the burdens involved in extended detention.

The district court found that the no-work rider is a blanket condition. We agree with the district court. The regulation is mandatory and the condition will

to the uncontested evidence, the threat that the regulation would be implemented has already had such an impact.

However the INS may attempt to characterize the regulations, the ultimate result is that a substantially larger number of aliens will be unable to secure immigration bonds and will be detained indefinitely pending the resolution of their claims.

be applied to individuals in a great variety of situations. The provisions governing work authorization apply only after the condition has been imposed. Even if aliens in one or two categories were excepted from the condition, the possibility of obtaining work authorization for some aliens at a later time would not transform this into a system of individualized determinations. This is a blanket condition.

II. STATUTORY AUTHORITY FOR THE REGULATION

The Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., is a comprehensive legislative scheme intended to govern all aspects of the admission of aliens to the United States. Regarding arrest and custody of aliens subject to deportation hearings, it provides:

> § 1252. Apprehension and deportation of aliens. (a) Arrest and custody; review of determination by court. (1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody . . . [A]ny such alien taken into custody may, in the discretion of the Attorney Geenral and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole. . . .

8 U.S.C.S. § 1252(a) (Law. Co-op.1987 & Supp. 1989).

The statutory question which has, from the outset, been presented in this case is whether the blanket imposition of a condition against employment in appearance and delivery bonds is within the discretion of the Attorney General under this provision. Since acquiescence in the provision is a condition of release from detention, and since violation of the condition would again lead to detention, we review both the power to detain and to impose the bond condition at issue. *See Flores v. Meese*, 906 F.2d 1315, 1322 (9th Cir. 1990) ("[S]ince the Attorney General's detention and bond release condition powers are interrelated, and their statutory evolution intertwined, we will examine them together"). We first examine the legislative history of the provision and the cases in which this statutory authority has been construed and applied, to determine the intentions of Congress and the basis on which discretion must be exercised. We then examine employment as a focus of the INA, including the amendments put in place by IRCA, for its relevance to the question of detention and bond conditions. We then review the cases which have ruled on bond conditions and similar restrictions imposed by the Attorney General under § 1252. We conclude, as have all prior opinions from this court and the district court, that this regulation is beyond the statutory authority conferred on the Attorney General by the INA.[8]

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[8] Because we hold the regulation unauthorized on statutory grounds, we do not reach the question of whether the regulation violates due process. *Jean v. Nelson*, 472 U.S. 846, 854-55, 105 S.Ct. 2992, 2996-97, 86 L.Ed.2d 664 (1985).

A. THE LEGISLATIVE HISTORY OF THE STATUTE

Section 242(a) of the Immigration and Nationality Act, 8 U.S.C. § 1252(a), originated as Chap. 29, § 20 of the Immigration Act of 1917, which granted the agency responsible for immigration policy the power to release individuals on bond pending a deportation hearing. Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 874, 890-91 (1917). Prior to 1952, § 20 made no reference to "discretion" and specifically limited the use of bonds to ensuring an alien's future appearance at a deportation hearing:

> Pending the final disposal of the case of any alien so taken into custody, he may be released under a bond . . . conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States.

Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 874, 891 (1917).

By 1950, Congress found this language inadequate to deal with its increased concern over subversion, since some courts construed the "may be released under a bond" language as a matter of right. *Carlson v. Landon*, 342 U.S. 524, 539, 72 S.Ct. 525, 533, 96 L.Ed. 547 (1952). Therefore, in 1950, Congress amended the immigration statute as part of the Subversive Activities Control Act. Internal Security Act of 1950, 64 Stat. 987, Title 1 (Subversive Activities Control Act of 1950), § 23. The provision regarding the Attorney General's discretion from the 1950 Act was incorporated into the 1952 Immigration and Nationality Act, and remains as § 242(a) today. Ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1252(a) (1988) [*sic*]; *see* H.R. Rep. 1365, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Admin.News 1653, 1711 ("This provision, in general, follows the procedure established by section 23 of the Subversive Activities Control Act of 1950.").

We recently reviewed the legislative history of this provision in depth, *Flores v. Meese*, *supra*, at 1322-1325, and need only briefly reexamine it here. Congressional discussion of this statutory provision first appeared in the reports on H.R. 10, a bill that did not pass. H.R. Rep. No. 1192, 81st Cong., 1st Sess. (1949) ("Facilitating the Deportation of Aliens from the United States, Providing for the Supervision and Detention Pending Eventual Deportation of Aliens whose Deportation Cannot be Readily Effectuated Because of Reasons Beyond the Control of the United States"); S.Rep. No. 2239, 21st Cong., 2d Sess. (1950) ("Facilitating Deportation of Aliens"). The primary focus of these reports was on aliens who had been determined to be deportable but who had not in fact been deported. Congress was particularly concerned with dangerous aliens whose deportation could not be effectuated: Of the six examples given in the House and Senate Reports, two were Communist leaders who had been found deportable 18 years and 21 years earlier; four were criminals (two child molesters, two habitual criminals). H.Rep. 1192, 81st Cong., 1st Sess. (1949) at 8-9; S.Rep. 2239, 81st Cong., 2d Sess. (1950), at 7-8. As one measure of increasing control over deportable aliens, the bill authorized the Attorney General to hold arrested aliens in custody, release them on bond, or on conditional parole, pending final determination of their

deportability and for a six-month period after an order of deportation was issued. S.Rep. No. 2239 at 5.

The language of the bill placed no limits on the authority granted to the Attorney General. The original draft mandated that all bonds include a condition requiring the alien to appear when ordered to do so, but this requirement was dropped before the statute was enacted. The Congressional reports stated that the Attorney General was to have "untrammeled" authority to impose conditions; however, the examples of conditions which were listed in the reports were conditions applied to individual cases and concerned matters related to the appearance of the alien or the amount of the bond. H.Rep. 1192, 81st Cong., 1st Sess. at 6; S.Rep. 2239, 81st Cong., 2d Sess. at 5. Nothing else in the reports and nothing in the statute indicated what the range of permissible conditions might be or whether a blanket condition could be imposed.

B. THE EXERCISE OF DISCRETION

In *Flores*, we therefore found that the bill upon which this statutory section was patterned "was meant to confer broad power upon the Attorney General to detain aliens prior to a final determination of deportability," at 1325, and that the Attorney General was authorized to prescribe bond conditions "beyond merely insuring appearance." At 1325. The Attorney General's detention was "not limitless," but he had "broad discretion in acting to fulfill the purposes of [the immigration] laws." *Id.* Therefore, although "perhaps the primary purpose" of detention was securing appearance, we rejected an argument that any regulation regarding detention must have the *sole* purpose of ensuring appearance

at deportation hearings. The regulation in *Flores*, governing the release of alien minors to certain adults, was authorized by statute because it was rationally related to securing appearance. At 1326-1327 (noting that "the decision of whether to detain or release a juvenile depends on the likelihood that the alien will appear for all future proceedings") (quoting 53 Fed.Reg. 17449). We noted that the regulation also served additional purposes rationally related to the statute, such as ensuring the well-being of alien minors, but found that the presence of these other purposes did not render the regulation beyond the Attorney General's rulemaking authority. At 1326-1327.

We commented that the statutory language "discloses no limitation on the Attorney General's detention power before an order of deportation is made final, except perhaps that implied by the word 'discretion.'" *Id.* at 1322. *Flores* did not review the cases which tested the statutory grant of discretion to the Attorney General to detain and set bond conditions. No such review was necessary, because the condition was rationally related to securing appearance, which we recognized as a primary purpose of the detention power. Once we determined conditions need not be concerned *solely* with appearance, we did not need to look farther.

However, these questions confront us now. The regulation at issue here bears no relation to ensuring appearance, nor has any such relation been claimed. Rather, the administrative notice promulgating the rule stated explicitly that prevention of employment by illegal aliens and safeguarding of employment of United States citizens and permanent resident aliens was more important than increased detention costs. 48 Fed.Reg. 51152.

We are therefore squarely presented with questions not at issue in *Flores:* In order to determine whether conditions are rationally related to the statute, we must determine how the statute has been construed. Since conditions are not limited to those *solely* concerned with ensuring appearance, we ask what limits constrain the power to detain and set conditions which Congress has granted to the Attorney General, and whether the condition imposed by the regulation at issue here falls within the limits of the Attorney General's discretion.

In *Flores*, we applied the standard first articulated in *Sam Andrews' Sons v. Mitchell*, 457 F.2d 745 (9th Cir.1972), which stated that the Attorney General's regulations must be upheld if they are founded on "considerations rationally related to the statute he is administering." *Flores, supra*, at 1322. *Flores* found we need only inquire into the existence of this rational relationship, *id.*, which it found met by the connection between securing appearance and releasing children only to certain adults.

In *Sam Andrews' Sons*, we made this inquiry, found that the rational relationship had not been established, and struck down for abuse of discretion a regulation which determined where alien commuters could be employed. The regulation in *Sam Andrews' Sons* provided that green cards could not be used to secure reentry into the United States for employment at a place of business where the Secretary of Labor had determined that a labor dispute existed. 457 F.2d at 747. We held this regulation not rationally related to the statute because it was not based on a rational distinction between different classes of aliens and because there was no hint in the statute or its legislative history that Congress intended the green card system to be used as a means to intervene in domestic labor disputes. *Id.* at 748.

To apply the "rational relationship" standard as articulated in *Sam Andrews' Sons* and *Flores*, we do not make sweeping statements regarding the statute's general concerns; rather, we must evaluate what the statute does and does not authorize in order to evaluate the regulation. We must inquire, as we did in *Flores*, whether the regulation is rationally related to the Attorney General's detention power. If it is, under *Flores*, the existence of additional purposes also rationally related to the statute will not render it invalid. *See Flores, supra*, at 1326-1327.

In *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952), the Supreme Court upheld the detention without bail under this provision of several Communist activists. In *Carlson*, the Supreme Court relied upon the purpose of the Internal Security Act to deport alien Communists as a menace to the public interest, and pointed to the evidence in each instance of "membership plus personal activity in supporting and extending the Party's philosophy concerning violence" which justified the Attorney General's discretion. *Id.* at 541, 72 S.Ct. at 534.

Carlson affirmed a Ninth Circuit decision which was part of a series of holdings defining the scope and proper exercise of the Attorney General's discretion. The aliens in *Carlson* first appealed when they were detained without bail pending determinations of deportability, and the district court ruled against them on habeas corpus. *Carlson v. Landon*, 186 F.2d 183 (9th Cir. 1950). We found the Internal Security Act was a constitutional response to a serious threat to national security. *Id.* at 187-188 (quoting Congressional findings of dangers of subversion). However, the provision governing detention before deportation hearings "does not give the Attorney General

or the Director absolute and final power to deny bail. Instead . . . [the provision] left bail to the discretion of the Attorney General rather than to his unlimited power to deny it. . . ." *Id.* at 185-86. The exercise of discretion was not consistent with the claim in the government's briefs "that the Director, under instruction from the Attorney General, can hold or release the alien without revealing his reason for the choice. . . ." *Id.* at 189. Although it was "arguable" that Congress might have meant to clothe the Attorney General with the unrestricted power to hold the alien without bail, this circuit and all other courts to address the subject agreed that "the Act cannot be so construed." *Id.* at 188.

The District Director of the I.N.S. had stated that he had reasonable cause to believe that Carlson's release would be prejudicial to the public interest and would endanger the welfare and safety of the United States. But this assertion was insufficient: "[T]he power to grant bail before a deportation hearing or refuse it, carries with it the necessity of exercising discretion and certainly discretion must be based upon some phase of fact." *Id.* at 186. Detention could not be sustained without a statement of "some fact upon which a reasonable person could logically conclude that the denial of bail is required to protect the country or to secure the alleged alien's presence for deportation should an order to that effect be the result of the hearing." *Id.* at 189. The case was remanded for the Attorney General "to reveal reasons for exercising his discretion, if he did exercise discretion in denying bail. . . ." *Id.*

In *Mangaoang v. Boyd*, decided days after the first *Carlson* opinion, we confronted slightly different facts. 186 F.2d 191 (9th Cir. 1950). Mangaoang,

the petitioner, declared there was a lack of evidence that he had ever been a member of the Communist Party, and that no evidence would be introduced that he was now a member or had been within five years before the warrant. *Id.* at 196. The District Director explained that the hearing would be held within two weeks, and that Mangaoang had been detained after the case had been examined in light of the Internal Security Act, considering all factors in the alien's situation and hardships which would be imposed. A message from the Assistant Commissioner of Immigration and Naturalization stated the aliens had been detained upon his order, under the authority of the Attorney General under the statute, following similar considerations to those the District Director described. *Id.*

We reversed the district court's judgment against the petition, which had been based upon "the error of law that proof of consideration of the facts relating to an alien under arrest was all that the situation required and that the Director was under no duty of revealing any of such facts." *Id.* at 197. Even though the hearings would be prompt and not drawn out, such evidence "does not satisfy the requirement that the denial of bail be based upon some specific fact pointing to the petitioners as bad risks to enlargement on bail." *Id.* at 196. Mangaoang did not again appeal the bail issue and appears not to have been further detained, though he successfully contested alienage.[9]

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[9] Mangaoang was later held not to have been an alien but a national of the United States during the period when he was a member of the Communist Party. He was therefore not deportable. *Mangaoang v. Boyd*, 205 F.2d 553 (9th Cir.), *cert. denied*, 346 U.S. 876, 74 S.Ct. 129, 98 L.Ed. 384 (1953).

In *Carlson*, on remand, the District Director gave specific evidence of continuing subversive activities by each of the aliens. The district court again upheld the denial of bail, and the aliens again appealed to the same panel of this court. *Carlson v. Landon*, 187 F.2d 991 (9th Cir. 1951). We explicitly stated our adherence to our earlier opinion, *id.* at 994, and summarized what the Attorney General must show: "discretion exercised . . . upon the question as to whether the release of appellants on bail would likely endanger the security of the United States and whether they likely would fail to present themselves at the deportation hearings." *Id.* at 993. The information that each of the detained aliens had been active in the Communist Party in 1949 provided the basis for the Attorney General's discretion in denying bail. "After viewing the whole case as to each petitioner," we affirmed the district court. *Id.* at 1003.

The aliens appealed to the Supreme Court, which affirmed in *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952). Nothing in the *Carlson* opinion limited our holding that discretion must be exercised upon facts shown about each detained individual. The Supreme Court first stated that detention was consistent with the power to deport because "[o]therwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings." 342 U.S. at 528, 72 S.Ct. at 528. Discretion to detain aliens without bail was placed in the Attorney General *because* "purpose to injure could not be imputed generally to all aliens subject to deportation. . . ." *Id.* Since the four petitioners in *Carlson* were active in Communist work and the petitioner in the companion

case was active in Communist activities, the discretion placed in the Attorney General was broad enough to justify detaining all these parties without bail "as a menace to the public interest." *Id.* at 541, 72 S.Ct. at 535.

Rather than changing our definition of the Attorney General's discretion, the Supreme Court's interpretation in *Carlson* supported it in several ways. First, more than mere membership in the Communist Party was required as a basis for detention. The requirement that the individual be *active* in subversive work as well as a member of the Party is significant, since membership in the Communist Party was sufficient to make an alien deportable. *Id. Carlson* cannot be read to support the current claim by the INS that *any* grounds for deportation will also be grounds for detention.

Further, this was not a blanket denial of bail. "There is no evidence or contention that all persons arrested as deportable under § 22 of the Internal Security Act . . . for Communist membership are denied bail." *Id.* at 541-42, 72 S.Ct. at 535. In fact, bail was allowed in most cases. *Id.* at 542, 72 S.Ct. at 535.

Finally, Congress' delegation of power to the Attorney General was permissible because the legislative standards were clear: "When in the judgment of the Attorney General an alien Communist may so conduct himself pending deportation hearings as to aid in the carrying out the objectives of the world communist movement, that alien may be detained." *Id.* at 544, 72 S.Ct. at 536. *Carlson* thereby confirms the requirement of individual dangerousness we had imposed in *Mangaoang* and the earlier *Carlson* opinions.

Discussing judicial review of detention decisions, *Carlson* quoted factors on which discretion was to be exercised from *United States ex rel. Potash v. District Director of INS*, 169 F.2d 747 (2d Cir. 1948) (*Potash*), a case under the old statute rather than under this statutory provision:

> The discretion of the Attorney General . . . is interpreted as one which is to be reasonably exercised upon a consideration of such factors, among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail.

Carlson, 342 U.S. at 540, 72 S.Ct. at 534. These factors reflect the same focus on danger and, particularly, on specific evaluation of the individual.

In *Ocon v. Landon*, 218 F.2d 320 (9th Cir. 1954), we interpreted the same provision as part of the Immigration and Naturalization [*sic*] Act.[10] *Id.* at 322-323. Ocon had been released and redetained under this provision; he argued that the Attorney General would have to find new information against him in order to redetain him. *Id.* at 323. We held this detention permissible because there was evidence of his continued subversive activities.

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[10] Although Ocon's hearing had since been decided, the court analyzed his detention under 8 U.S.C. § 1252(a) because no "final order" had been issued as his case was still under review. *Id.* at 323. This is the same analysis followed by the District of Columbia Circuit in *Rubinstein v. Brownell*, 206 F.2d 449 (D.C.Cir.1953), *aff'd by an equally divided court*, 346 U.S. 929, 74 S.Ct. 319, 98 L.Ed. 421 (1954).

Ocon acknowledged how great a power had been invested in the Attorney General by this provision:

> In reading Mr. Justice Black's dissent in the Carlson case, supra, it becomes apparent that he felt the impact of the jailing of a person who had not even been charged with a crime. We feel it too. . . . [but since Ocon did not deny any charges against him] his interim custody after continued and undenied Communist activity puts a different light upon [this] bald statement.

218 F.2d at 326. The *Ocon* court, like the earlier Ninth Circuit opinion in *Carlson*, justified this "jailing of a person . . . not even charged with a crime" by the dangers of subversion which Congress had recognized when it passed the Internal Security Act. Further, *Ocon*'s description of the detention power is a weighty one: "[I]t is the solemn duty of the Attorney General to revoke the bail the moment he has information which in reason appears to subject the United States to hurt by the alien while at large." *Id.* at 324.

However, even while it emphasized the extraordinary power and responsibility conferred here, *Ocon* held that the Attorney General must act "upon an *informed* discretion." *Id.* (citing *Carlisle v. Landon*, 73 S.Ct. 1179, 97 L.Ed. 1642 (Douglas, J., in chambers)) (emphasis in original). Discretion was "*informed*" when Ocon demonstrated "continued and undenied" Communist activity in the period before he was retaken into custody. *Id.* at 326. The court emphasized the dangers of subversion in this period and the nature of the Congressional response. *Ocon* quoted a statement from *U.S. ex rel. Yaris v. Esperdy*, 202 F.2d 109, 111 (1953), also quoted in

Rubinstein v. Brownell, 206 F.2d 449 (D.C. Cir. 1953), *aff'd per curiam by an equally divided court*, 346 U.S. 929, 74 S.Ct. 319, 98 L.Ed. 421 (1954), holding that the allegation of communist activity up to the time of rearrest refuted the claim of abuse of discretion in revoking bail.

Rubinstein v. Brownell held that the exercise of discretion must be a reasonable one, *id.* at 455, and that where the alien was *not* dangerous to society and there was no suggestion that he would flee or hide, the Attorney General could not detain him. *Id.* at 456. This is consistent with *Hernandez-Avila v. Boyd*, 294 F.2d 373 (9th Cir.1961), in which we found no abuse of discretion in high bail under this provision when the alien faced embezzlement charges in both the United States and Mexico, had no firm ties in the district where he was apprehended, and had repeatedly fled to avoid facing deportation.

From these cases emerges an unmistakable emphasis on the situation of each individual as the focus of the exercise of discretion. The significant power which is placed in the Attorney General must be exercised on the specific, individual circumstances of the person who faces the determination of his alienage or deportability under this statutory section. Further, the considerations involved are outlined consistently from *Potash* under the old statute, through *Carlson* and its connected cases under the Internal Security Act, through *Ocon* and *Rubinstein* under the INA. The detention power which the Attorney General is granted discretion to exercise is one concerned —in addition to ensuring appearance—with protecting the nation from danger, from active subversion.

This leaves us with two questions which must be answered in order to determine whether the challenged regulation imposing a condition against employment is within the discretion of the Attorney General: whether unauthorized employment is the type of harm or danger contemplated in the grant of this detention power, and whether bond conditions are limited by the scope of the detention power. We turn first to an examination of the question of unauthorized employment.

C. EMPLOYMENT IN THE LEGISLATIVE SCHEME OF THE INA

Before IRCA

Since 1952, Congress has amended the INA numerous times, including many provisions dealing with employment. However, it has never amended § 242 (a). *See generally* Hutchinson, Legislative History of American Immigration Policy 1798-1965 (1981); Harper, Immigration Laws of the United States (1975). Virtually every immigration act and amendment has dealt in some fashion with employment policy, and the Supreme Court has recognized that a "primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893, 104 S.Ct. 2803, 2809, 81 L.Ed.2d 732 (1984).[11] However, even if employment is an important concern of immigration law, it does not at all follow that detention and bond conditions related to employment either cohere with the

[11] Although *Sure-Tan* also quoted *DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976), on the "peripheral" concern of the INA with employment, 467 U.S. at 892, 104 S.Ct. at 2808, both cases were essentially concerned with preemption or applicability of state or other federal laws. Neither case held that immigration policy was unconcerned with alien employment.

legislative scheme or are within the discretion of the Attorney General.

Nothing in the Act explicitly authorizes detention in relation to employment, and nothing suggests the appropriateness of *blanket* employment-related conditions. In fact, the INA draws careful distinctions between different categories of aliens based on family ties, student, business or professional status, and many other characteristics. 8 U.S.C. § 1101(a)(15)(A-N); 1101(a)(27)(A-I). A blanket condition barring employment is inconsistent with this complex legislative and regulatory scheme.

Prior to the enactment of the regulation, employment or the prospect of employment had generally been deemed a positive factor in determining the conditions under which to release aliens from detention. According to the undisputed evidence, in setting immigration bonds immigration judges frequently determined the amount of the bond "based on an assessment of the stability of the individual, with the prospect of employment being one of the most significant stabilizing facts. Unavailability of employment might result in substantially higher bonds, and a resulting substantial increase in the numbers of those unable to be bonded out." As the Director of the Center for Immigrant Rights stated in her declaration, "[t]raditionally, in bail reduction hearings, a job or an offer of a job has always been considered a positive element because that means stability and an assurance that the immigrant will not abscond." With the proposed no-work condition, the INS has effectively turned what was previously deemed a positive characteristic and an indicium of stability into a prohibited activity. The INS concedes that traditionally employment has been deemed a favorable factor: "De-

fendants admit that in the past in some bond proceedings immigration judges have considered the alien's employment history as indicative of stability and an assurance that he will not abscond." The INS claims, however, that "this is logically and legally irrelevant to this lawsuit. . . ." We disagree. To the extent that past practices are inconsistent with the proposed regulation, they are relevant to the question whether the no-work condition and detention in response to employment was authorized prior to the enactment of IRCA.

Further, our review of the treatment of employment riders by the Board of Immigration Appeals and the Attorney General discloses no authority for *detention* in relation to unauthorized employment. Employment riders were first applied to appearance and delivery bonds in the early 1970s, and the Board twice divided over their legality. *Matter of Toscano-Rivas*, 14 I & N 523, Int.Dec. #2256 (1973). Detention was not considered a permissible response to unauthorized employment: the INS had "emphatically disavow[ed] any general service policy of rearresting the recalcitrant alien who violate[d] the condition once released." *Id.* at 542. Only the money associated with the bond might be forfeited. *Id.* at 539 ("The penalty is not detention . . . but the loss of the $500"), 539 n.2 ("The threat of forfeiture of the bond is a deterrent. Custody is something else. Even if the bond is breached, it by no means follows that confinement is desirable or indicated, or will necessarily take place."). The attorney general's discretion regarding detention must be "based on a new and different set of considerations." *Id.* at 539 n.2. The BIA had found that detention was impermissibly implicated solely because it was the leverage by

which the agreement to the bond condition was extracted. *Id.* at 540-541. The language of the bond, attached to the Attorney General's opinion, reveals that the money was conditioned upon both the appearance of the alien and his refraining from employment unless authorized by the INS. *Id.* at 557-58.

At the request of the Board, the Attorney General examined the specific question of his authority to impose employment-related conditions. *Id.* at 550 (1974). Reviewing *Carlson*, *Rubinstein*, and *Witkovich*, the Attorney General found that employment-related conditions were clearly acceptable during the six month period after deportability was established in "cases in which an alien's past employment would have a direct bearing upon his availability for hearings or deportation or upon national security." *Id.* at 556. Obviously, availability and national security are the same considerations which underlie the detention power; this cannot be read as a firm conclusion by the Attorney General that the power to impose bond conditions was broader than the power to detain. The Attorney General went then on to suggest that "the various purposes of the immigration laws, including safeguarding employment opportunities for legal residents, *may* suggest the appropriateness of various bond conditions." *Id.* at 556 (emphasis added). However, he emphasized the necessity of a regulation to guide determinations of such bond conditions. Although non-standard riders already required approval by a regional commissioner, "additional substantive safeguards would be appropriate with respect to the condition at issue here." *Id.* at 556-57 & n. 23.

This review by the Attorney General, relied upon by the INS as authority for the challenged regulation, 48 Fed.Reg. 51142, is at most a tentative and

partial approval, under the statutory structure existing at the time, of the imposition of money bonds against unauthorized employment under carefully structured individual circumstances. It does not support the mandatory blanket no-work condition imposed by the regulation. *Toscano-Rivas* shows concern for the limits courts have placed on bond conditions and states the Attorney General's belief that individualized determinations with structured review procedures were necessary for any such condition to be imposed. The INS had disavowed any intention of detaining aliens who worked without authorization, and the Attorney General made no reference to such detention. Put another way, he claimed no unlimited power to detain under the INA, no authority to detain in response to employment violations, nor any authority that would have included blanket conditions. This brings us again to the point the district court and this court have reached before. Before IRCA, this regulation was beyond the authority conferred by the statute.

After IRCA

Ironically, although this case was remanded for further consideration in light of IRCA, both parties state that IRCA has made no difference to the authority for this regulation. The INS argues that our prior opinions were wrongly decided, and that IRCA merely re-emphasizes the concerns with employment which are evident in the INA. The NCIR argues that authority for the regulation never existed, and that IRCA has not granted such authority. We review the statute to determine whether IRCA changed the discretion invested by this provision or represented a Congressional finding regarding the dangers of unauthorized employment which would justify imposing the blanket no-work rider.

IRCA is a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected. *See* Mazzoli, *Immigration Reform: The Path to Passage and Beyond*, 14 J.Legis. 41 (1987) ("this legislation represents a delicate balance between widely divergent views and interests about immigration"). It states a tempered enforcement policy qualitatively different from the sweeping concerns with subversion of the Internal Security Act:

> Section 115. Enforcement of the Immigration Laws of the United States.
>
> It is the sense of Congress that—
>
> (1) the immigration laws of the United States should be enforced vigorously and uniformly, and
>
> (2) in the enforcement of such laws, the Attorney General shall take due and deliberate actions necessary to safeguard the constitutional rights, personal safety, and human dignity of United States citizens and aliens.

Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359, 3384. *See* Montweiler, The Immigration Reform Law of 1986: Analysis, Text and Legislative History (1987).

In the Internal Security Act, Congress had made extensive and explicit findings regarding what it determined was grave danger to national security, emphasizing foreign direction and control of political movements, as well as the participation by individual "disloyal aliens" in these threats to national security. Internal Security Act of 1950, Sec. 2, *quoted in Carlson*, 186 F.2d at 187. A close examination of IRCA reveals that it clearly distinguishes employment concerns from threats to national security. Under Section 201(a) of IRCA, national security remains grounds for exclusion which may be waived in the course of legalization. 8 U.S.C. § 1255a(d)(2)(B)(ii)(IV). The paragraphs explicitly retained by IRCA exclude Communists, anarchists, or others who advocate the violent overthrow of the United States government. 8 U.S.C. § 1182(a)(28)(C), (D), (F). This provision also continues to exclude "[a]liens who . . . the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally *to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.*" 8 U.S.C. § 1225a(d)(2)(B)(ii)(IV); 8 U.S.C. § 1182(a)(27) (emphasis added).

In direct contrast, IRCA's legalization provisions specifically render *inapplicable* (not merely waivable at the Attorney General's discretion) the grounds for exclusion in the INA which govern aliens entering the United States for skilled or unskilled work without labor certification. 8 U.S.C. § 1255a(d)(2)(A); 8 U.S.C. § 1182(a)(14). Also, no alien may be found inadmissible on grounds concerned with becoming a public charge "if the alien demonstrates a history of employment in the United States evidincing self-support without receipt of public cash assistance." 8 U.S.C. § 1255a(d)(2)(B)(iii). The structure of the grounds for exclusion shows that Congress did not consider unauthorized employment by individual aliens as the sort of danger to the nation addressed in § 1182 and the Internal Security Act.

In addition to these distinctions in the text of the statute, the legislative history of IRCA reveals a carefully crafted, balanced approach to the problems of illegal immigration. The Senate Report explained that "The Committee bill is intended to increase control over illegal immigration," and that "[t]he pri-

mary incentive for illegal immigration is the availability of U.S. employment." S.Rep. 99-132, 99th Cong., 1st Sess. 1 (1985). The report described serious problems associated with illegal employment, including loss of jobs for low-income Americans, *id.* at 5-6, but also emphasized that many problems caused by illegal immigration arose from difficulties with assimilation into America.[12] The Senate placed particular significance on these social factors:

> Although population and direct economic impacts are of great significance, we think most people would agree that the national interest of the American people also includes certain even more important and fundamental aspects, such as the preservation of freedom, personal safety, and political stability—as well as the public cultural qualities and the political institutions which are their foundation.

Id. at 6.

Similarly, when the Senate explained "[t]he [s]olution" embodied in IRCA, *id.* at 7, it first noted that there were "only two types of solution available

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[12] If immigration is continued at a high level, yet a substantial portion of these new persons and their descendants do not assimilate into the society, they have the potential to create in America a measure of the same social, political, and economic problems which exist in the countries from which they have chosen to depart. Furthermore, if language and cultural separatism rise above a certain level, the unity and political stability of the Nation will—in time—be seriously diminished. Pluralism, within a united American nation, has been the single greatest strength of this country. This unity comes from a common language and a core public culture of certain shared values, beliefs, and customs which makes us distinctively "Americans."

S.Rep. 99-132, 99th Cong., 1st Sess. 7 (1985).

to the problem of illegal immigration." *Id.* It then described these two different aproaches to illegal immigration. The first was *direct enforcement*, which included physically preventing entry into the United States through border patrol and interdiction, and finding and deporting those who were successful in entering illegally or entered legally and then violated the terms of their visas.[13] The second approach involved *reducing the incentives to enter*. IRCA's solution was a program "which combines direct enforcement at reasonable levels with a reduction in the incentives to enter the United States." *Id.* at 8.

Reducing the incentive of unauthorized employment was key to reducing incentives to enter. These incentives to enter illegally were created by the disparity in job opportunities between the United States and the Third World. *Id.* In light of the difficulties of changing these incentives in the short term by directly tackling this substantial disparity through Third World development, and the unacceptability of reducing the disparity through deterioration in the United States, "only one approach remains: to prohibit the knowing employment of illegal aliens." *Id.* Therefore, the Senate chose to penalize "employers who knowingly employ illegal aliens and . . . persons who knowingly and for a fee or other consideration recruit or refer for employment such illegal aliens." *Id.*

Following this approach, the principal sanctions in IRCA are aimed at employers. Section 101 of the Act establishes penalties making employment of unauthorized aliens unlawful. 8 U.S.C. § 1324a. The em-

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[13] In the introduction to the Report, the Senate had noted the sense of Congress that resources for direct enforcement and immigration services should be increased. *Id.* at 1.

ployer is required to keep records of the verification of employees' eligibility to work. 8 U.S.C. § 1324a (b) (1) (c). Civil and criminal penalties are provided for violations. 8 U.S.C. § 1324a(e), (f).

While the INS argues that the authority to detain aliens is consistent with the goals and objectives of IRCA, the legislative history reveals otherwise. The regulation disrupts the careful balance which Congress achieved in IRCA. While Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the *employee*, it ultimately rejected all such proposals. *Immigration Control and Reform Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy*, 99th Cong., 1st Sess. (1985), S.Hrg. 99-273, at 56, 59 (In response to the proposal that aliens be fined or detained as a deterrence to illegal immigration, Senator Simpson, the Chairman of the Senate Judiciary Committee, stated that this was not a new recommendation, but one that had previously been suggested and rejected). *See also* 118 *Cong.Rec.* H30155 (daily ed. Sept. 12, 1972) (statement of Rep. Rodino) (the House Judiciary Committee decided not to impose any additional criminal sanctions or other penalties on employees, believing that such penalties "would serve no useful purpose"). Instead, it deliberately adopted sanctions with respect to the *employer* only. Congress quite clearly was willing to deter illegal immigration by making jobs less available to illegal aliens but not by incarcerating or fining aliens who succeeded in obtaining work. During the extensive debates and hearings conducted during earlier attempts to enact similar legislation, the INS specifically agreed that employee sanctions, such as denying aliens employment pending deportation hearings or detaining aliens, should be rejected. James

Hennessey, the Executive Assistant to the INS Commissioner, testified that the INS would not attempt to control employment during deportation proceedings:

> Rep. Rodino: [During deportation proceedings] the fact that an illegal alien is a holder of a job or some employment, means that there is no such surveillance on the part of the Service or anybody that he won't be holding the job?
> Mr. Hennessey: He will undoubtedly continue. In fact, having still the right to go before the Board [of Immigration Appeals], I don't think we could attempt or ask for any legislation that he not hold the job. We will not expect the individual to starve in the United States while he is exhausting both the administrative and judicial roads that the legislation gives him.

Illegal Aliens, Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 92d Cong., Serial No. 13 pts. 1-5, pt. 1 at 46. Even an INS District Director for Detroit Michigan who favored administrative action against illegal aliens who worked, explicitly rejected detention as a means of curtailing immigration:

> Mr. Pederson: I believe that we ought to impose a penalty against the alien to help stop him [from working].
>
> Rep. Rodino: What kind of penalty would you impose on the alien?
>
> Mr. Pederson: Well, I do no feel that a fine or imprisonment is the answer but I do feel that there should be some form of sanction. It could be possible to deny administrative relief of some form.

Id., pt. 3 at 919. The House Judiciary Committee concluded at the end of this round of hearings that "[t]he illegal entrant should not be subject to additional penalties. . . ." *Id.*, pt. 1, at 90.

Although some continued to argue for restraints against the employee, the approach of controlling employment through *employer* not *employee* sanctions was adjudged by Congress to provide the only realistic and appropriate solution.[14] As stated in the final House report, employer sanctions, "coupled with improved border enforcement, is the *only* effective way to reduce illegal entry and in the Committee's judgment it is the most practical and cost-effective way to address this complex problems." H.R.Rep. No. 99-682(I), 99th Cong., 2nd Sess. 49, *reprinted in* 1986 *U.S.Code Cong. & Admin.News.* 5653 (emphasis

[14] As late as 1985, researcher Dr. Barry Chiswick again proposed to the Senate Immigration Subcommittee that a policy of detaining "illegal worker for a period of several months prior to deportation" should be adopted as a means of deterring illegal immigration. He believed that "[d]etention may be the only mechanism for reducing the extent to which the border is treated as a resolving door" and "a fine in terms of time—detention—for several months would be costly to the alien and have a deterrent effect." Thus, he strongly advocated the policy which in effect the INS seeks to implement through the proposed regulation, asserting that detention would "offer a better hope than . . . employer sanctions." *Immigration Control and Reform Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy*, 99th Cong., 1st Sess. (1985), S.Hrg. 99-273, at 44-45. Senator Simpson, the Committee Chairman, noting that the proposal was "not something new," and rejected it as "politically harsh [and] unrealistic." *Id.* at 56. He opposed the detention proposal and recommended that Congress try the "most humane" and "the most sensible humanitarian approach", employer sanctions, first before considering harsher measures. *Id.* at 59.

added). Thus, Congress adopted "a graduated three-step series of administrative, civil, and criminal penalties for *employers* violating this prohibition." *Id.* at 5656 (emphasis added). The INS regulation would override the clear policy choice which Congress made in IRCA, and would upset the careful balance which Congress achieved in that legislation. The no-work bond condition, and the detention of individuals who violate that condition, is the very type of employee deterrence mechanism which Congress rejected in IRCA. By administrative decree, the agency would now adopt a drastic employee sanction in contravention of a contrary determination by the legislature—and in conflict with the agency's representations before Congress.

Further, while the bond condition has great impact upon the individuals to whom it is applied, it does not reach the vast majority of those who work without authorization. Most aliens arrested by the INS agree to voluntary departure without a hearing. *INS v. Lopez-Mendoza*, 468 U.S. at 1044, 104 S.Ct. at 3486 (97.5% departed without a hearing). Similarly, the regulation does not affect unauthorized employment by those who are released on parole rather than on bond. Therefore, most of those who might work without authorization will not find their incentives to illegal immigration affected by this regulation.

The other provisions of IRCA provide no support for the regulation. Section 103 imposes penalties of fines or imprisonment for fraudulent use of immigration documents or false attestations used to satisfy the verification requirements imposed on employers by the Act. 18 U.S.C. 1546. Section 111 deals with appropriations for enforcement and service activities of the INS, including direct border patrols, enhanced

community outreach, and adjudication of petitions and other applications under the INA. Pub.L. No. 99-603, 100 Stat. 3381. Section 112 is concerned with penalties for transporting aliens into the United States in violation of the immigration law and, consistent with employer sanctions, removes an exception which had previously exempted employment from penalties for harboring aliens. 8 U.S.C. § 1324(a).

Section 102 includes a carefully drawn provision in which Congress prohibits employment discrimination based on national origin or citizenship. 8 U.S.C. § 1324b. This protection extends to aliens who intend to become citizens, as well as current United States citizens. 8 U.S.C. § 1324b(a)(1)(B), (a)(3)(B). Much of the rest of IRCA is concerned with the legalization of aliens formerly here illegally, a Congressional choice in sharp contrast with the focus of the Internal Security Act on deporting *all* alien Communists, summarized in our first *Carlson* opinion as an authority arising from a "moving factual appraisal of an outstanding conspiracy of aliens and a few mentally intoxicated or drugged citizens and a sprinkling of the vicious, directed by a foreign government." *Carlson*, 186 F.2d at 187.

The emphasis on employer sanctions in IRCA militates against reading in the authority to detain individuals to prevent them from working. The emphasis on the rights of aliens as well as citizens shows a concern for fair and humane enforcement of the immigration laws which is at odds with the blanket no-work rider. It is hard to conceive that Congress, which adopted employer sanctions in the belief that it is "the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens," would condone the harsh and inhumane measures at issue here. H.R.Rep. No. 99-682(I),

99th Cong., 2nd Sess. 46, *reprinted in* 1986 *U.S.Code Cong. & Admin.News 5650*. The regulation is unlikely to affect those considering traveling to this country because of the lure of jobs; it would, however, have a drastic affect on individuals already in the United States, who may well have a legitimate claim to remaining here. The regulation would force the latter group to choose between starving on the streets or remaining in detention. Any effort on the part of individuals to work in order to pay for food, shelter, medical care, or to provide for their families, pending resolution of their cases may land them back in jail. The other options might be even less desirable, not only for the aliens but for society as a whole. Surely, Congress could not have intended to reduce these claimants—some legitimate and likely to become future citizens—to such choices in order to survive.

In contrast to Congress' approach in the Internal Security Acts, in which Congress supported detention of alien communists with lengthy findings on the dangers of subversion, Congress in IRCA showed no interest in expanding detention of aliens. The detention presented by the regulation at issue here—detention to prevent unauthorized employment—runs contrary to the fundamental policy determinations made by Congress in enacting the legislation involved. IRCA shows a congressional choice to reduce employment incentives by sanctioning employers, not employees.

Unlike *Flores*, *supra*, where we addressed a regulation which did not conflict with congressional judgment, here we confront a regulation contrary to a congressional policy clearly elaborated in IRCA. Congress made its view known by rejecting provisions for employee sanctions. That rejection necessarily includes sanctions that flow from violations of bail

provisions or from incarcerations for refusing to agree not to work.

The only mention of bonds for employees in IRCA is an explicit prohibition which prevents employers from shifting the burden of sanctions. Section 101 includes a provision entitled "Prohibition of Indemnity Bonds," which states:

> (1) Prohibition. It is unlawful for a person or other entity, in the hiring, recruiting, or referring for employment of any individual, to require the individual to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under this section relating to such hiring, recruiting, or referring of the individual.

8 U.S.C. § 1324a(g)(1). Violations of this prohibition are subject to civil penalties. 8 U.S.C. § 1324a (g)(2).

The regulation on alien commuters in *Sam Andrews' Sons*, lacked rational relation to the statute because nothing in the statute intimated that Congress intended the green card system to be used as a means of Government intervention in domestic labor disputes. 457 F.2d at 745. There is nothing in IRCA which sanctions money bonds of the type once contemplated in *Toscano-Rivas* being placed upon individual alien workers, and nothing which sanctions detention to prevent these individuals from working. Since the bond condition here is unrelated to the danger of subversion considered by the Internal Security Acts and is contrary to congressional judgment in IRCA, we conclude that to increase detention through use of the rider is an abuse of the Attorney General's discretion.

D. CONDITIONS PLACED UPON BOND

Finally, we must inquire into what bond conditions can be imposed under this statutory section. In *Flores*, we characterized the regulation governing the release of alien minors as a condition on release, rather than a condition of bond. Still, *Flores*, requirement of a rational relationship to the statute and our approval in that case of the regulation regarding children must be considered in evaluating bond conditions. Because *Flores* found a relationship to appearance, however, it did not evaluate prior cases to determine what other conditions might be imposed in the absence of the power to detain.

Few cases reviewing permissible conditions on bond have arisen under § 1252(a). We examine these cases and find additional guidance in Supreme Court decisions under § 1252(d) which make an explicit comparison with § 1252(a). The cases reveal that the decision to impose conditions upon release must also be guided by informed discretion and does not extend to imposing any condition at all, even when an alien might have been initially detained. When detention is not at issue, the Supreme Court has limited conditions to those related to the alien's appearance for deportation proceedings.

After *Carlson* was affirmed in the Supreme Court, the INS introduced a new type of bond, laden with controlling conditions, for aliens awaiting deportation proceedings. *Yanish v. Barber*, 73 S.Ct. 1105 (1953) (Douglas, J., in chambers). One condition on Yanish's bond barred Yanish from associating with any person who he knew or had reason to believe was a Communist. "[T]aken literally [the condition] would prevent him from living with his Communist wife or going to a movie with his Communist son or seeing

his Communist legal adviser or being treated by his Communist doctor." Justice Douglas granted bail without the conditions. *Id.* at 1108-9.

In *Carlisle v. Landon*, 73 S.Ct. 1179 (1953) (Douglas, J., in chambers), the distinction between the initial discretion to detain and the power to impose conditions was even more closely presented. Carlisle was one of the defendants whose detention was upheld by the Supreme Court in *Carlisle v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952). Bail had been granted during the course of the earlier proceedings. Carlisle continued his appeal on the basis that the only recent evidence against him was association with groups found to be "subversive" or "Communist front" organizations, rather than activities within the Communist Party itself. *Id.* 73 S.Ct. at 1180. During his appeal, under the provisions of 242(a), the Attorney General required a bond with conditions similar to those imposed in *Yanish v. Barber*. *Id.* 73 S.Ct. at 1179. When Carlisle refused to accept the new bond, he was redetained. *Id.* at 1181.

Justice Douglas granted bail. During the time Carlisle had been at large he had not done a single unlawful act; he merely refused to execute "the Yanish type of bond." *Id.* at 1182. "Up until then his enlargement on bail had been deemed wholly consistent with the national security. Once he refused to execute the new type of bond he was deemed sufficiently dangerous as to be taken into custody once more." *Id.* at 1182. Justice Douglas found that Carlisle was being detained "solely because he is not amenable to the desires of the Attorney General. That too would be permissible if the Attorney General has acted within the scope of his authority," but that authority was in doubt.

Carlisle anticipated resolution by the Supreme Court of the question of the Attorney General's authority to impose bond conditions. However, the lawfulness of restrictive conditions was finally tested in relation to aliens who had been proved deportable and were under continued orders of supervision under 8 U.S.C. § 1252(d). Although early drafts of this provision had authorized indefinite detention of aliens after deportability was determined, indefinite detention was later dropped from the statute to avoid a constitutional question. *U.S. v. Witkovich*, 353 U.S. 194, 200-201, 77 S.Ct. 779, 782-83, 1 L.Ed.2d 765 (1957). Criminal penalties for violations were imposed instead. S.Rep. 2239, *supra*, at 8. The provision authorized the Attorney General, among other things, to require the alien to "give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." It also required the alien to "conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case." 8 U.S.C. § 1252(d).

In *Witkovich* and its companion case, *Barton v. Sentner*, 353 U.S. 963, 77 S.Ct. 1047, 1 L.Ed.2d 901 (1957), the Supreme Court limited the apparently broad discretion granted the Attorney General under 8 U.S.C. § 1252(d), holding that conditions must be related to ensuring the alien's appearance for deportation. "A restrictive meaning for what appear to be plain words may be indicated by the Act as a whole, by the persuaisve gloss of legislative history or by the rule of constitutional adjudication, relied on by the District Court, that such a restrictive meaning must be given if a broader meaning would generate

constitutional doubts." *Witkovich*, 353 U.S. at 199, 77 S.Ct. at 782. The Court restricted the statutory grant of authority despite Congressional intent to control subversive aliens who could not be promptly deported, *id.* at 200-201, 77 S.Ct. at 782-83, which was the main focus of the original Senate and House Reports on the provision, *see generally* S.Rep. 2239, 81st Cong., 2d Sess. (1950); H.R.Rep. 1192 (81st Cong., 1st Sess.).

In *Witkovich*, the Court held that an alien being supervised more than six months after his deportation had been ordered could not be forced to give information about matters unrelated to his readiness for deportation. 353 U.S. at 200-201, 77 S.Ct. at 782-83. Although *Witkovich* dealt only with what information could be required of an alien and distinguished the potentially long duration of supervision under 1252(d) from the "customarily brief" period during which active alien Communists could be detained before deportation hearings, *see* 353 U.S. at 198, 77 S.Ct. at 781 (noting that *Carlson* concerned detention of "active alien Communists"), at 201, 77 S.Ct. at 783 (noting that detention of aliens pending determination of deportability was was "customarily brief"), *Sentner* established additional substantive limits.

Sentner concerned the Attorney General's authority to prescribe "reasonable written restrictions" on the alien during this period. The restrictions placed on Sentner more closely resembled the condition against employment. Sentner had been supervised under an order which forbade her, among other things, to violate the Smith Act, a deportable offense subject to criminal penalties. *Sentner v. Colarelli*, 145 F.Supp. 569 (E.D.Mo.1956), *aff'd per curiam sub nom. Barton v. Sentner*, 353 U.S. 963, 77 S.Ct. 1047, 1 L.Ed.2d

901 (1957). The supervisory powers conferred by statute could not be used as an indirect means of implementing penalties which already existed under the Smith Act nor adding to the penalties she faced. 145 F.Supp. at 575. Since this provision would not affect most subversives, but only deportable aliens under supervision while awaiting deportation, Congress would not be assumed to have delegated this additional authority in such general terms. 145 F. Supp. at 576.

Sentner also held that the alien could not be restricted from membership in the Communist Party, furthering its policies, or associating with Communists. *Id.* at 576-579. Six months after deportability was determined, the only power the Attorney General had was to deport the alien or to supervise her. Supervision was not an end in itself but merely an auxiliary to the power to deport. *Id.* at 577. Statutory interpretation and the principle of avoiding constitutional questions mandated this restrictive reading of the statute. *Id.* at 577-79, 583.

The *Sentner* court read the power to detain reviewed in *Carlson* as concerned with national security, *id.* at 577, 579, and explicitly compared the statutory provision under review there with the one we review here: "It might be suggested . . . that the Attorney General has been authorized to prescribe any reasonable written regulation calculated to protect the security of the nation, a standard more or less similar to the standard guiding the exercise of his discretion to detain without bail under Section 242(a)." 145 F.Supp. at 579. Even if the statute authorized such discretion, the conditions imposed would constitute an abuse of discretion in the absence of any threat to national security. *Id.* Restrictions on her conduct were limited to those which

would ensure her availability for deportation. *Id.* at 577, 582-83. The Supreme Court affirmed over a dissent which complained that this significantly enlarged the holding of *Witkovich*. 353 U.S. at 963, 77 S.Ct. at 1047.

Together, the cases on bond conditions show the limits of the Attorney General's power to impose conditions on release. *Sentner's* refusal to find a grant of Congressional authority to control Smith Act violations through this provision is significant: since most aliens arrested by the INS take voluntary departure, *INS v. Lopez-Mendoza*, *supra*, restrictions on bond conditions only reach a fraction of the population whose employment is regulated under the INA. *Sentner* and *Witkovich* read section 242(a) as concerned with national security. The power to supervise aliens was an auxiliary of the power to deport, not an end in itself. These cases demonstrate that conditions are limited by the same factors which constrain detention: where there is no power to detain, conditions must be related to ensuring the alien's appearance.

CONCLUSION: THE ATTORNEY GENERAL'S DISCRETION

The essence of the INS position is that when this provision became part of the INA, the power to detain and to impose conditions of bond was vastly increased: from a focus on ensuring appearance or averting serious danger to the nation, such power could now be exercised for any purpose related to the immigration laws. We question whether Congress could have intended such an expansion of discretion without discussion, and our review discloses no authority for this position. In fact, we recently noted

the importance of appearance as a focus of the detention power—a position which is consistent with our historic interpretation of this provision. *Flores*, *supra*, at 1326. In *Sam Andrews' Sons*, we did not rely on the breadth of the INA and its ability to control employment generally, but focused on the goals and purposes of the various provisions of the statute. Case law has established the purpose and limits of the detention power.

In *Ocon*, we treated the Attorney General's discretion under the INA as coextensive with his discretion under the Internal Security Acts; however, *Ocon* concerned an individual who would have been in custody under the Internal Security Acts as well. *See also Sentner v. Colarelli*, 145 F.Supp. 569, 577, 579, *aff'd per curiam* 353 U.S. 963, 77 S.Ct. 1047, 1 L.Ed.2d 901 (1957) (Congressional grant of authority to Attorney General under section 242(a) for purposes of national security). In *Flores*, we noted the requirement of rational relationship to the statute, but did not decide whether this had changed the detention power. *Flores* was in accord with our earlier cases, since the condition it considered was rationally related to ensuring appearance, as was the high bond in *Hernandez-Avila v. Boyd*, *supra*.

The Supreme Court's affirmance in *Rubinstein v. Brownell* answers the question of the continuity of scope of this provision, since it presented the case of an alien who would not have been detained under the Internal Security Act. 206 F.2d 449 (D.C.Cir.1953) *aff'd per curiam by an equally divided court*, 346 U.S. 929, 74 S.Ct. 319, 98 L.Ed. 421 (1954). Rubenstein had been convicted of draft evasion and served time in prison; he had a criminal record. Yet he was "not hostile to the Government or likely to engage in subversive, criminal, or reprehensible activities. . . ."

206 F.2d at 456. There was "no suggestion that he [would] flee or hide." *Id.* He could not be continued in custody under this provision without any indication that he would hurt the country or would flee. Absent such a determination, his detention would have been an abuse of discretion. *Id.* Under *Rubinstein*, therefore, the Attorney General's detention power remained unchanged when this provision became part of the INA.

Whenever the authority granted by this provision was judicially tested under either statute which contained it, the Attorney General's discretion was found to be similar in scope. At the time the provision was enacted, this circuit examined its impact in the light of what we determined was "our government's resistance to as venal an attack on its very existence as the long story of 'man's inhumanity to man' reveals." *Ocon*, 218 F.2d at 326. In the crucible of concern with national security, we found no broader authority than this:

The Attorney General does *not* have unlimited power to detain. *Carlson*, 186 F.2d at 185. The claim of unlimited power to detain is not, in fact, the exercise of discretion. *Carlson*, 186 F.2d at 189 (Director had argued in the briefs that there was "no question of discretion" but an authority to hold or release an alien without revealing his reason for the choice); *Mangaoang*, 186 F.2d at 197 ("*if* he did exercise discretion in denying bail") (emphasis added). Discretion is delegated to the Attorney General because evil purpose cannot be imputed to all aliens. *Carlson*, 342 U.S. at 538, 72 S.Ct. at 533. He must exercise "*informed* discretion." *Ocon*, 218 F.2d at 524, citing *Carlisle v. Landon*, 73 S.Ct. 1179 (Douglas, J., in chambers). The exercise of this discretion rests upon actions showing participation in activities which endanger the country, in addition to the status (i.e., Party membership) which makes each individual deportable. *Carlson*, 342 U.S. at 541, 72 S.Ct. at 534; *see also Carlson*, 186 F.2d. The short duration of detention is not the critical factor. *Mangaoang v. Boyd*, 186 F.2d at 196. "[T]he denial of bail must be based upon some specific fact pointing to the petitioners as bad risks to enlargement upon bail." *Id.*

This controlling authority disposes of the most fundamental claim made in the briefs of the INS: "Once there are sufficient grounds to warrant the arrest of a person as a deportable alien, *any* release is a matter of grace, grantable and revocable by the Attorney General at his discretion." Brief for Appellant at 18. Grounds for deportation are not automatically grounds for detention. Further, the emphasis in these cases on facts as to each individual forecloses the Attorney General's "discretion" to put in place a "presumption" that work is unauthorized, if such a presumption will lead directly to detention. This is supported by the Attorney General's own evaluation of the scope of his discretion in *Toscano-Rivas, supra*, which claimed no power to detain in response to illegal employment and emphasized the need for "substantive safeguards," contemplating *only* individualized decisions.

The exercise of discretion under the statute must be based on specific facts regarding the individual related to reasons why he is a poor risk for enlargement upon bail or may endanger the nation while he is at liberty. Because the blanket condition is not individualized, it could not be considered informed grounds for detention. Unauthorized employment has discretion even if unauthorized employment were

never been held to justify detention, and IRCA made no findings of danger to the nation like the Congressional findings in the Internal Security Act. Informed discretion is incompatible with a blanket no-work provision. The regulation was promulgated beyond the authority delegated by the statute.

The judgment of the district court is AFFIRMED.

TROTT, Circuit Judge, Dissenting:

After *Flores v. Meese*, 913 F.2d 1315, 1322 (9th Cir.1990), our task in this case is uncomplicated: we must decide if the regulation under scrutiny is founded on considerations rationally related to the statute from which it derives.[1] Majority op. at 1360. The answer to this question appears simple.

An unmistakable purpose of the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 *et seq.* ("INA") is to

> provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country.

H.R.Rep. 1365, 82d Cong.2d Sess. 51 (1957). As the Supreme Court observed in *Sure-Tan, Inc. v. NLRB*, "[a] primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893, 104 S.Ct.

[1] *Flores* holds that the Attorney General is authorized to prescribe bond conditions "beyond merely insuring appearance," At 1325, a holding recognized by the majority opinion and applied in this case.

2803, 2809, 81 L.Ed.2d 732 (1984). This purpose, if anything, was fortified by the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359 (1986) which reiterated the desire of Congress to erect at the borders barriers designed to protect U.S. citizens, and others here with lawful permission to work, from competition by illegal aliens not authorized by law to work in this country. The objective of this Act was to stop illegal aliens from working, period.

This proposition to me is so clear that, with all respect to my distinguished and esteemed colleagues, I do not see how it can be debated. I am unpersuaded by the majority opinion's attempt to escape the inexorable weight of the evidence on this issue. The majority opinion's attempt to find something to the contrary in the IRCA's adoption of employer sanctions is thoroughly unpersuasive. In no way do the existence of employer sanctions suggest or imply that unauthorized work by illegal aliens is somehow acceptable. The choice of sanctions does not alter the primary thrust of the legislative scheme which is to deter and to prevent unauthorized employment. Unauthorized employment by illegal aliens remains illegal, and, illegal aliens who are working without lawful authority are still expected to be stopped and to be calendared for removal from the country.

The disputed regulation furthers this goal. It says to persons apprehended and waiting to be considered for deportation that if they are to be released on bond pending resolution of the proceedings, they cannot work. In my view, the majority opinion improperly invades the province of the Attorney General, and I would reverse the district court.

But I am not sure what this case is about. The INS in its brief assures us that the disputed regula-

tions "bar only *unauthorized* employment" (emphasis in original). I read the majority opinion as being willing to go along with such a regulation, but not having any confidence in the integrity of INS's representation, choosing instead to try to find a way to discount it and construe the regulation as covering *all* employment, even if otherwise lawful or authorized. Majority op. at 1353-1354. The majority opinion in essence prohibits the INS from doing something it claims it does not want to do, i.e., bar all employment by persons released on bond, even if the person has a legitimate right to work. This puts us in the position of refereeing a noncontroversy. I suppose its none of my business, but it seems the way out of this power struggle is for the INS to cure the ambiguities in its regulatory scheme so that the regulations accurately reflects its objective, which is to prevent aliens who are not authorized to work from doing so while they are out on bond. This hardly seems controversial. If that is all INS wishes to do, it has the untrammeled power to get it over with and end this debate.

I DISSENT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-5774

D.C. No. 83-7927-KN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS-APPELLEES

v.

IMMIGRATION & NATURALIZATION SERVICE, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Filed Dec. 21, 1989

OPINION

Before: WARREN J. FERGUSON, STEPHEN REINHARDT, and STEPHEN S. TROTT, Circuit Judges.

PER CURIAM:

This case involves the question of the validity of an Immigration and Naturalization Service ("INS") regulation that requires the inclusion in release bonds of a blanket condition prohibiting aliens from engaging in employment pending the outcome of their de-

portation hearings. The National Center for Immigrants' Rights, Inc., and a number of other organizations and individuals, requested a declaratory judgment that the regulation exceeds the scope of the Attorney General's statutory authority, and a permanent injunction against its implementation. The Immigration and Naturalization Service, Alan Nelson, Commissioner, and Attorney General William French Smith were named as defendants. The district court granted summary judgment to the plaintiffs. A notice of appeal was timely filed. The caption of the notice reads, "National Center for Immigrants' Rights, Inc., et al., Plaintiffs, v. Immigration and Naturalization Service, et al., Defendants." The body of the notice states, "Notice is hereby given that defendants in the above-referenced action hereby appeal to the United States Court of Appeals for the Ninth Circuit. . . ." The appellees now challenge the adequacy of the notice of appeal.

The appellees, relying on *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S. Ct. 2405 (1988), have filed a suggestion that we dismiss the appeal for lack of jurisdiction. They interpret *Torres* as standing for the proposition that under Rule 3(c) of the Federal Rules of Appellate Procedure the names of the parties appealing must be listed in the body of the notice of appeal. Failure to do so, argue the appellees, necessitates dismissal of the appeal. *Torres*, however, does not stand for such a broad nor exacting proposition. In *Torres*, a notice of appeal from a judgment of dismissal listed the names of 15 out of 16 plaintiffs as parties to the appeal in the body of the notice, but did not list the petitioner. "It is undisputed that the omission [of the petitioner's name] in the notice of appeal was due to a clerical error," but since the petitioner "was never named or

otherwise designated" when all the others were specifically named, the notice of appeal failed to give "fair notice of the specific individual or entity seeking to appeal." *Id.* at 2407, 2409. The use of the phrase "et al." in the caption also failed to provide notice of a particular defendant's intent to appeal. *Id.* at 2409. Thus, the court of appeals properly held that the judgment of dismissal was final as to the petitioner. *Id.*[1]

The case at hand, in contrast, presents an entirely different question. Here, no names were listed in the body of the notice, and no individual was inadvertently omitted as a result of clerical error. Instead, the term "defendants" was used in the body of the notice. The issue before us is whether that term fairly indicates that *all* and not just *some* of the defendants are appealing the decision below. We think that clearly it does.[2]

We hold that *Torres* does not require that the individual names of the appealing parties be listed in instances in which a generic term, such as plaintiffs

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[1] Appellees also rely on *Allen Archery, Inc. v. Precision Shooting Equipment*, 857 F.2d 1176 (7th Cir. 1988), a case in which there were two defendants, Precision Shooting and Shepley, but the notice of appeal stated only "Precision Shooting Equipment, Inc., defendant, hereby appeals. . . ." The Seventh Circuit held that the notice did not constitute an appeal on the part of Shepley. As is clear from the text of our decision, *infra*, the holding of *Allen Archery*, like that of *Torres*, is of little relevance to the issue before us.

[2] Even if "defendants" only referred to some defendants we would not dismiss the entire appeal; for jurisdiction would exist as to the Immigration and Naturalization Service, the defendant specifically named in the caption of the notice of appeal. *Mariani-Giron v. Acevedo-Ruiz*, 877 F.2d 1114 (1st Cir. 1989).

or defendants, adequately identifies them. We find the reasoning of the Sixth Circuit in *Ford v. Nicks*, 866 F.2d 865, 870 (6th Cir. 1989), on this point persuasive. The body of the notice in *Ford* stated that "[n]otice is hereby given that the defendants' appeal to the United States Court of Appeals for the Sixth Circuit. . . ." *Id.* at 869. The court reasoned that "[t]here are some 18 defendants, and the statement that 'the' defendants are taking the appeal gives fair notice that all 18 desire to be appellants, not just some of them. . . . We think it would be manifestly improper for us to read the words 'the defendants,' in the body of the instant notice, as meaning Chancellor Roy S. Nicks only. The other defendants may have been designated somewhat 'inartfully,' to borrow the adverb used in *Torres*, but to say that they were not designated at all would be untrue." *Id.* at 870.

Following the reasoning of *Ford*, we find that the notice of appeal here is also proper. Although the caption reads "Immigration and Naturalization Service, et al." the body of the notice reads "[n]otice is hereby given that defendants in the above-referenced action hereby appeal. . . ."[3] It is sufficiently clear from the body of the notice that all of the defendants

[3] In *Meehan v. County of Los Angeles*, 856 F.2d 102, 105 (9th Cir. 1988), we considered the question whether a notice of appeal naming "Brian Meehan, et al" was sufficient to constitute an appeal on behalf of two unnamed defendants as well. We held that it was not. Our opinion does not indicate whether the quoted words appeared in the caption of the notice, the body, or both. What is clear, however, is that, unlike the case before us, there is no suggestion in the opinion that the names of the two other defendants appeared anywhere in the notice of appeal or that any generic term such as "defendants" or "the defendants" was used instead.

are seeking to appeal. While their intention might arguably have been clearer had the defendants used the article "the" in front of the word "defendants," the omission of the article does not require a different result from that reached by the Sixth Circuit. Defendants, in its normal usage, means all defendants not just some. Had only *some* defendants intended to appeal, the proper term to be used in the body of the notice would have been "certain defendants." Alternatively, if only some defendants desired to appeal, those defendants could have identified themselves individually. As stated by the Advisory Committee Notes on the 1979 amendment, "so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with." *Id.* at 870. As was the case in *Ford*, " 'the function of notice' was met as to each of the defendants' in this case," therefore, this court has jurisdiction over the appeal and over each of the defendants.[4]

The suggestion raised by appellees of want of jurisdiction and appropriateness of dismissal is hereby rejected.

[4] In *Mariani-Giron v. Acevedo-Ruiz*, 877 F.2d 1114, 1116 (1st Cir. 1989), the First Circuit held that it had jurisdiction over Acevedo-Ruiz's appeal since he was named in the caption of the notice of appeal. In its opinion, the court assumed that it lacked jurisdiction over Acevedo-Ruiz's wife and the conjugal partnership although the word "defendants" was used in the body of the notice. However, the court found it unnecessary to rule on that issue since it found jurisdiction over Acevedo-Ruiz's appeal sufficient for purposes of the proceedings before it, and since the wife and partnership were merely derivative rather than real defendants. To the extent that dictum in *Mariani-Giron* suggests that the use of the term "defendants" is insufficient to give notice that all defendants are appealing, we simply disagree.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-7927-KN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

[Filed Dec. 31, 1987
Entered Jan. 6, 1988]

I. INTRODUCTION

This case has been remanded by the United States Court of Appeals for the Ninth Circuit for further consideration in light of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603 (also known as the "Simpson-Rodino Act of 1986"), which was enacted after this Court entered summary judgment in favor of plaintiffs. The Court requested briefing from the parties on the effect of the IRCA on the inclusion by the Immigration and Naturalization Service ("INS") of a condition barring unauthorized employment in every appearance and delivery bond issued in connection with a deportation proceeding. After careful consideration of these briefs and the record in this case, the Court finds that the IRCA does not affect this Court's earlier ruling granting summary judgment in favor of plaintiffs.

Defendants contend that this Court's earlier ruling was incorrectly based on a misreading of the legislative history of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101 *et seq.*, in particular §§ 1252(a) and 1103(a), and on an unfounded conclusion that the unauthorized employment of aliens, or undocumented workers, was not one of the primary concerns of the United States immigration laws. Defendants further contend that the 1986 amendments to the Act (i.e., the IRCA) provide additional evidence of Congress' past and present concern with the impact of such employment on the American workforce.

The Court agrees with defendants that there are aspects of the Act concerned with the impact of the employment of undocumented workers on the American workforce and that the IRCA specifically deals with the issue of such employment by the implementation of employer sanctions. This, however, does not alter the Court's conclusion that the regulations in question in this case were promulgated beyond the statutory authority of the Attorney General, in that the Attorney General's discretion to condition release on bond pending deportation is properly limited to conditions that are related to obtaining an undocumented worker's appearance at future immigration proceedings and does not extend to the blanket imposition of a no-work condition on all undocumented workers who are released on bond pending future deportation proceedings. *See* March 5, 1985 Order.

II. THE IRCA

In 1986 Congress passed the IRCA. Broadly speaking, the IRCA is composed of two major parts. First, the IRCA provides for amnesty to certain undocumented workers. Second, the IRCA establishes a system of sanctions against employers who employ undocumented workers in violation of the provisions of the act. 8 U.S.C. § 1324A. The Court finds that the issue currently before it is a narrow one and can be stated as follows: whether a consideration of the IRCA changes this Court's ruling that the regulations as codified in 8 C.F.R. §§ 103.6(a)(2)(ii) and (iii) and 109.1(b)(8) were promulgated beyond the statutory authority of the Attorney General? Only the employer sanctions are relevant to this analysis.

In the Court's original order, filed March 5, 1985 and entered March 7, 1985, the Court fully considered defendants' argument that the mandatory inclusion of a condition barring unauthorized employment by undocumented workers in an appearance and delivery bond furthered the broad purpose of the Act to protect the United States domestic labor force. The Court examined in detail the legislative history of 8 U.S.C. § 1252(a), which gives the Attorney General the authority to prescribe bond conditions, in order to interpret the statutory language. The Court found that the scope of the Attorney General's discretion under § 1252(a) is not unlimited, as revealed by the section's legislative history and the history of its previous versions. Conditions that are within the Attorney General's discretion to impose are limited to those aimed at obtaining an undocumented worker's appearance at future immigration proceedings; no-work provisions do not serve this purpose.

Defendants renew their argument that the central purpose of the Act is the protection of the American labor force from competition and displacement due to illegal immigration. Defendants contend that the employer sanctions provisions of IRCA underscore this central purpose and erase any doubt that such concern is a peripheral one. Defendants, however, offer nothing further to demonstrate that the IRCA in any way broadens the specific examples of allowable conditions set out by Congress in the legislative history of § 1252(a). These allowable conditions relate solely to the ability of the INS to maintain contact with and control over undocumented workers on bond pending deportation proceedings.

In addition, defendants give no further justification for the use of a blanket no-work provision that is devoid of individualized determinations as to employment status. The availability of individualized determinations for those undocumented workers who apply to the district director for work authorization, who have claimed that they already have received such work authorization, or who have filed a bona fide application for asylum does not transform the blanket no-work provision into a system of individualized determinations. This Court has already analyzed these two questions in deatil and has distinguished *Carlson v. Landon*, 342 U.S. 524 (1952), in its March 5, 1985 Order and incorporates those portions of the earlier order in this order.

Defendants also cite to § 1103(a), which generally gives the Attorney General authority to administer and enforce the Act, as support for its argument that the Attorney General has wide discretion in promulgating regulations. Although § 1103(a) appears to give the Attorney General broad discretion in general relating to the Act's administration and enforce-

ment, § 1252(a) specifically deals with the Attorney General's discretion to impose bond conditions. Section 1252(a) places certain limits on the Attorney General's discretion within a specific context. The recognition of such limits is not inconsistent with a general principle of broad discretion that appears to be contained in § 1103(a).

The Court acknowledges that the dicta in *DeCanas v. Bica*, 424 U.S. 351, 360 n.9 (1976) prompts the question of whether the existence of employer sanctions elevates the employment of undocumented workers from a "peripheral concern" of the Act to the Act's primary concern, thereby making the no-work provision a proper exercise of the Attorney General's discretion. Although the enactment of employer sanctions makes this question a more difficult one, the Court is not prepared at this juncture to find that the passage of the IRCA gives the Attorney General unbridled discretion to impose bond conditions, such as the bond regulations at issue in this case. The Court notes as significant that the bond regulations are aimed at employees, whereas the sanctions in the IRCA target employers.

III. CONCLUSION

Based on the analysis above, the Court finds that the IRCA does not alter this Court's earlier ruling; therefore, the Court finds that summary judgment in favor of plaintiffs is warranted.

IT IS SO ORDERED.

DATED: December 31, 1987

/s/ David V. Kenyon
DAVID V. KENYON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA No. 85-6131

DC No. CV 83-7927-KN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS-APPELLEES

vs.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California
Hon. David V. Kenyon, District Judge, Presiding
Argued and submitted April 9, 1986 at
Pasadena, California

[Filed June 13, 1986]

OPINION

Before: HUG and NORRIS, Circuit Judges, and SOLOMON,* District Judge.

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

SOLOMON, Judge:

The Immigration and Naturalization Service (INS) appeals the district court's grant of summary judgment in favor of National Center for Immigrants' Rights, Inc. (NCIR), appellees. The district court held that the inclusion of a condition barring unauthorized employment in every appearance and delivery bond issued in connection with a deportation proceeding exceeded the Attorney General's statutory authority under the Immigration and Nationality Act (I & N Act or Act). We affirm.

Facts

The I & N Act[1] is a comprehensive scheme intended to govern all aspects of the admission of aliens to the United States. The Act provides for the arrest and deportation of aliens present in the United States in violation of the law. 8 U.S.C. § 1357(a)(2) (1982). An alien taken into custody pending a final determination of deportability may, in the discretion of the Attorney General, "(1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole." 8 U.S.C. § 1252(a).

Under this statutory authority, the INS promulgated the following regulations:

> (ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in

[1] 8 U.S.C. §§ 1101-1503.

> connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate.
>
> (iii) *Factors to be considered.* Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:
>
> (A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;
>
> (B) Prior immigration violations by the alien;
>
> (C) Whether there is a reasonable basis for considering discretionary relief; and
>
> (D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.[2]
>
> * * *
>
> Any excludable or deportable alien who has posted an appearance and delivery bond may be granted temporary employment authorization if the District Director determines that employment is appropriate under § 103.6(a)(2)(iii) of this chapter.[3]

[2] 8 C.F.R. § 103.6(a)(2)(ii) and (iii) (1985).

[3] 8 C.F.R. § 109.1(b)(8) (1985).

Appellees[4] filed this action to challenge the implementation of the regulation on both statutory and constitutional grounds. The district court granted a preliminary injunction enjoining the enforcement of the regulations. This court affirmed. *National Center for Immigrants Rights, Inc. v. Immigration and Naturalization Service*, 743 F.2d 1365 (9th Cir. 1984).

On remand, the district court granted appellees' request for class certification. The class consists of "all those persons who have been or may in the future be denied the right to work pursuant to 8 C.F.R. § 103.6." The district court held that the regulations are invalid because they were promulgated beyond statutory authority and because they impose a blanket condition on all arrested aliens. The district court granted summary judgment in favor of appellees.

In this appeal, the INS contends that the language of the Act gives the Attorney General complete discretion to impose any release condition which furthers the provisions of the Act. In addition, the INS contends that the district court lacked jurisdiction over individuals in the class because: 1) appellees did not file a habeas corpus proceeding as required by the Act; and 2) certain individuals failed to exhaust their administrative remedies.

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[4] Appellees include thirteen nonprofit organizations providing free legal aid services to aliens with immigration problems, a local United Auto Workers affiliate, eleven named aliens held in detention, four named aliens released on bonds with conditions against unauthorized employment, and one unnamed alien who claims to be deterred from filing for benefits with the INS because of fears that the new regulations would result in that alien's indefinite detention.

Standard of Review

Appellate courts review *de novo* a trial court's grant of summary judgment. *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983). Summary judgment is appropriate when there are no genuine issues of material fact and when the evidence, viewed in a light most favorable to the opposing party, entitles the movant to prevail as a matter of law. *Id.* The court shall consider all admissible affidavits and supplemental documents on a motion for summary judgment. Fed. R. Civ. P. 56. Proper jurisdiction is a question of law and is also subject to *de novo* review. *See Clayton v. Republic Airlines, Inc.*, 716 F.2d 729, 730 (9th Cir. 1983).

Discussion

Jurisdiction of the District Court

In a class action, the court must have jurisdiction over the claims of the individual members of the class. *See Califano v. Yamasaki*, 442 U.S. 682, 701-702 (1979). The class certified must be limited to individuals who meet the requirements of the relevant jurisdictional statutes. *Id.*

Appellees assert that because the INS failed to raise its jurisdictional arguments at the trial level, the INS is precluded from raising them now. This assertion is without merit. A party may raise jurisdictional challenges at any time during the proceedings. *May Dept. Store v. Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir. 1980).

The INS contends that the district court lacked jurisdiction because NCIR failed to file the habeas

corpus action required under 8 U.S.C. § 1252.[5] We reject this contention because we have already determined that section 1252(a) is inapplicable to this case because the section deals only with complaints about delays in determining the deportability of individual aliens. *National Center*, *supra*, 743 F.2d at 1368.

The INS also contends that NCIR failed to exhaust the administrative remedies that the Act secures to detained aliens. The only exhaustion requirement of the Act[6] applies to "orders of deportation or of exclusion" and not to conditions imposed on bonds prior to such order. We hold that the district court had jurisdiction over the members of the certified class.

Review of Summary Judgment

Absent a clearly expressed legislative intent to the contrary, the language of a statute must ordinarily be regarded as conclusive. *Consumer Product Safety*

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[5] 8 U.S.C. § 1252(a) provides in part that:

> Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

[6] 8 U.S.C. § 1105a(c) (1982) provides in part that:

> An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

The INS asserts that the language of 8 U.S.C. § 1103 and § 1252(a) clearly grants authority to the Attorney General to impose any condition in a bond that he deems necessary to carry out the provisions of the Act. The Act contains a provision which conditions the entry of certain aliens into the United States on employment considerations. 8 U.S.C. § 1182 (a)(14). These limitations reflect Congress's desire to protect the American workforce from displacement due to immigration. The INS argues that the no-work condition is directly related to this purpose of the Act and is within the Attorney General's statutory authority.

The Attorney General may release an arrested alien pending a determination of deportability under a security bond "containing such conditions as the Attorney General may prescribe." 8 U.S.C. § 1252 (a). The express language of the statute appears to grant wide discretion to the Attorney General. Nevertheless, legislative history, prior legislation, and case law limit the allowable conditions to those that tend to insure the appearance of the alien in future proceedings.

Section 1252(a) deals solely with the arrest, custody and control of an alien pending determination of deportability. The specific examples of allowable conditions set out by Congress in the legislative history[7] relate solely to the ability of the Attorney General and the INS to maintain contact with and

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[7] H.R. Rep. No.1365, 82d Cong., 2d Sess. 6 (1952); H.R. Rep. No. 2980, 81st Cong., 2d Sess. (1950); H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950).

control over aliens. These indicate a Congressional intent to limit the Attorney General's authority under section 1252(a) to the imposition of only those conditions which tend to insure an alien's appearance at future proceedings.

Relying on *Carlson v. Landon*, 342 U.S. 524 (1952), the INS asserts that the Attorney General's authority to impose bond conditions is not limited to these conditions. In our opinion, such reliance is misplaced. *Carlson* involved a challenge to the Attorney General's authority to hold five active Communists without bail pending the determination of their deportability. The Attorney General based his denial of bail primarily on the heightened Congressional interest in protecting the United States and its citizens from Communist activity, evidenced by the Internal Security Act of 1950,[8] and the Subversive Activities Control Act of 1950.[9] *Id.* at 529.

The Supreme Court examined the applicable deportation standards and found that the Attorney General did not have "untrammeled discretion" in determining bail. "[H]e must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity." *Id.* at 543.

The Court examined the specific legislative scheme of the Internal Security Act of 1950 and found that the statute granted the Attorney General authority broad enough to justify the detention of the Communist aliens. *Id.* at 541. Although the court noted that the general consideration for denial of bail was to insure availability for trial, it found that the Communist threat to the national security was ex-

[8] 8 U.S.C. §§ 137 and 155.

[9] 50 U.S.C. §§ 781-826.

ceptional. The Court held that the Attorney General was within the scope of his authority when he denied bail to the Communist aliens.

The scope of discretionary authority granted to the Attorney General under the Internal Security Act is much greater than the authority granted him under the Act. This court previously noted in *National Center*, *supra*, 743 F.2d at 1370:

> In contrast to Congress' clear directives under the Internal Security Act in the area of national security, "[t]he INA evinces 'at best evidence of peripheral concern with employment of illegal entrants.'" *Sure-Tan, Inc. v. NLRB*, —— U.S. ——, 104 S.Ct. 2803, 2809, 81 L.Ed.2d 732 (1984) (quoting *DeCanas v. Bica*, 424 U.S. 351, 360, 96 S.Ct. 933, 939, 47 L.Ed.2d 43 (1976)).

In *DeCanas v. Bica*, 424 U.S. 351 (1976), the Supreme Court held that a California statute that prohibited the knowing employment of illegal aliens if such employment would adversely affect lawfully resident workers was not preempted by the Act. *Id.* at 365. Likewise, in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the Supreme Court held that the application of the National Labor Relations Act to undocumented aliens was not prevented by the Act because the Act was only peripherally concerned with the employment of aliens.

In *Carlson*, *supra*, there was evidence that each individual, at the time of his arrest, was a member of the Communist Party and had participated in the Party's indoctrination of others. *Carlson*, *supra*, 342 U.S. at 530. This evidence of individual personal activity justified the Attorney General's discretion to deny bail. The *Carlson* court noted that not all de-

portable Communist aliens were automatically denied bail. This holding is in contrast with the regulations in this case which subject all arrested aliens to the no-work condition until the alien can prove "compelling reasons" for granting employment authorization.

The Attorney General, in his interpretation of his authority under the Act, has recognized the need for individualized determinations rather than the imposition of a blanket condition. *Matter of Toscano-Rivas, et al.*, 14 I & N Dec. 523 (1974). Earlier regulations and INS case law have required individualized determinations before the inclusion of a no-work condition in the bond. *See Matter of Chew*, I & N Dec. #2910 (July 1, 1982); and *Matter of Vea*, I & N Dec. #2890 (November 4, 1981).

The statutes, legislative history, and pertinent case law indicate that the Attorney General's authority under 8 U.S.C. § 1252(a) of the Act is limited to the imposition of bond conditions which tend to insure the alien's appearance at future deportation proceedings. The peripheral concern of the Act with the employment of illegal aliens is not sufficient to support the imposition of a no-employment condition in every bond.

AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-7927-KN (JRx)

NATIONAL CENTER FOR IMMIGRANTS' RIGHT, INC., ET AL., PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

[Filed Mar. 5, 1985]

ORDER

In 1983, the Immigration and Naturalization Service ("INS") promulgated Regulations[1] ("the Regulations") which place a condition barring employment in an appearance and delivery bond in connection with deportation proceedings. The no-work condition operates as follows: When a person is arrested as a suspected illegal alien and is later released on bond pending a deportation proceeding, the suspect is barred from becoming employed. How-

[1] 8 C.F.R. §§ 103.6(a)(2)(ii), (iii) (1983); 109.1(b)(8) (1983).

ever, the suspect may obtain employment authorization from the INS District Director upon application establishing "compelling reasons" for granting employment.

This action, brought by Plaintiffs[2] on December 6, 1983, challenged the implementation of the Regulations on both statutory and constitutional grounds. On December 16, 1983, this Court granted a preliminary injunction enjoining the enforcement of the Regulations. The Court of Appeals upheld the preliminary injunction on September 28, 1984.

The INS then brought this Motion for Summary Judgment, pursuant to Fed. R. Civ. P. 56(b), on the grounds that there is no genuine issue as to any material fact and that the INS is entitled to judgment as a matter of law. The Court finds that no genuine issue of material fact exists and that summary adjudication is appropriate. The Court further finds that the Regulations at issue are invalid because they were promulgated beyond statutory authority. Therefore, the Court grants Summary Judgment for the Plaintiffs, National Center for Immigrants' Rights, *et al.*, based upon its First Cause of Action.

This Court's grant of Summary Judgment for the Plaintiffs, as nonmoving parties, is consistent with prior case law. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-12 (9th Cir. 1982). Even though Plaintiffs

[2] Plaintiffs include thirteen nonprofit organizations providing free legal aid services to aliens with immigration problems, a local United Auto Workers affiliate, eleven named aliens held in detention, four named aliens released on bonds with conditions against unauthorized employment and one unnamed alien who claims to be deterred from filing for benefits with the INS because of fears that the new regulations would result in that alien's indefinite detention.

have made no formal cross-motion under Fed. R. Civ. P. 56, summary judgment is appropriate in this case because the INS has had an adequate opportunity to show that there is a genuine issue of fact and that their opponent is not entitled to judgment as a matter of law. Moreover, this is "in keeping with the objective of Rule 56 to expedite the disposition of cases and . . . with the mandate of Rule 54(c) requiring the court to grant relief to which a party is entitled 'even if the party has not demanded such relief in his pleadings.'" Wright & Miller, *Federal Practice and Procedure*, § 2720 (1983).

The Plaintiffs have asserted six Causes of Action in the instant case:

1. The Regulations at issue are invalid due to the fact that they were promulgated without statutory authority;
2. The INS Commissioner lacks statutory authority to promulgate the Regulations because they remove matters from the jurisdiction of immigration judges;
3. The Regulations violate the Fifth Amendment's Due Process Clause because it impinges on an important liberty interest without the opportunity for notice, hearing and due process proceeding of record;
4. The Regulations violate the Fifth Amendment's Equal Protection guarantee due to the adverse effect on indigent people;
5. The Regulations are inconsistent with and superseded by other federal legislation;
6. The INS has failed to establish uniform procedures to implement "work authorization"

policies and thereby violates Fifth Amendment guarantees of procedural and substantive due process.

The Court bases its ruling on the First Cause of Action and finds as a matter of law that the Regulations at issue were promulgated without statutory authority and are therefore invalid. Further, since the Court grants summary judgment on the Plaintiffs' First Cause of Action, consideration of the remaining five Causes of Action is unnecessary.

The Regulations state in relevant part:

§ 103.6 Surety bonds.

(a) . . . .

(2) *Bond riders*—(i) *General.* Bond riders shall be prepared on Form I-351 and attached to Form I-352. If a condition to be included in a bond is not on Form I-351, a rider containing the condition shall be executed.

(ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate.

§ 109.1 Classes of Aliens eligible.

. . . .

(b) . . . .

(8) Any excludable or deportable alien who has posted an appearance and delivery bond may be granted temporary employment authorization if the District Director determines that employment is appropriate under § 103.6(a)(2)(iii) of this chapter.[3]

. . . .

(Sec. 103 of the Immigration and Nationality Act, as amended (8 U.S.C. 1103))

8 C.F.R. §§ 103.6, 109.1 (1984).

The Court finds that two crucial issues are presented by this case. The first consists of whether the Attorney General can impose release conditions which are unrelated to securing the alien's presence at future deportation proceedings, yet which further the broad purposes of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* The second issue involves the discretion of the Attorney General to impose a blanket condition which inherently precludes any individualized determination.

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[3] § 103.6(a)(2)(iii) provides factors to be considered for a grant of employment authorization:

Factors to be considered. Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:

(A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;

(B) Prior immigration violations by the alien;

(C) Whether there is a reasonable basis for considering discretionary relief; and

(D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.

I. *Can the Attorney General impose release conditions based on § 1252(a) which further a broad purpose of the Immigration and Nationality Act, but which are unrelated to securing the alien's presence at future deportation proceedings?*

The INS claims that the Attorney General's authority to condition an alien's release with a no-work provision pending deportation proceedings is well within his discretionary powers to carry out the broad purposes of the Immigration and Nationality Act ("INA"). Citing the protection of the U.S. domestic labor force as the broad purpose of the INA, the INS asserts that the no-work condition is reasonably related to this legitimate government interest. The INS bases its argument on the language, legislative history, and judicial and administrative interpretations of 8 U.S.C. 1252(a).

That section states:

> Pending a determination of deportability in the case of any alien . . ., such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, *containing such conditions as the Attorney General may prescribe;* or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody and

> detained until final determination of his deportability.

8 U.S.C. § 1252(a) (emphasis added).

Although § 1252(a) appears on its face to grant a great deal of discretion to the Attorney General in his decision on whether to release an alien under bond, this discretion must be interpreted in light of a previous version of § 1252(a) as contained in § 242 of the Immigration and Nationality Act and its legislative history. This previous version read in part:

> . . . such alien may, in the discretion of the Attorney General, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. *It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself when required to do so for the purpose of defending himself againt the charge or charges under which he was taken into custody . . . .*

Pub. L. 831, 81st Cong., 1st Sess. § 23, reprinted in 1950 U.S. Code Serv. 1006 (emphasis added).

The accompanying legislative history of the previous version of § 1252(a) stated:

> These provisions, of course, enumerate only one of the conditions which is mandatory in the bond or as a parole condition. *This bill intends that the Attorney General shall have full discretion in imposing any other conditions or terms in the bond or parole agreement which he may see fit to include. Thus, a man released on bond might*

> *have as a condition of the bond that he also be subject to make periodic reports to the immigration officials as to his whereabouts and furnish other desired information.* Or a bond might provide as one of its conditions that upon demand by the Attorney General the existing bond shall be surrendered and a new bond in greater or less amount or other conditions shall be furnished. This bill intends that the Attorney General shall have untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond or conditional parole pending final determination of the deportability of the alien . . . .

H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950) (emphasis added). The applicability of this legislative history is underscored by H.R. Rep. No. 1365, 82d Cong., 2d Sess., 57, reprinted in 1952 U.S. Code Cong. & Ad. News 1653, 1711, which indicates that when Congress enacted § 1252(a) in its present form in 1952, that "this provision, in general, follows the procedure established by section 23 of the Subversive Activities Control Act of 1950." *Id.* Therefore, the scope of discretionary authority given to the Attorney General under the previous version also governs the scope of the discretionary authority provided here. Thus, the scope of discretionary authority of the Attorney General remains unchanged under § 1252(a).

The Court finds that the aforementioned statutory language, as shown by its legislative history, reveals that the Attorney General's discretion to condition release on bond pending deportation is properly limited to conditions which are related to obtaining an alien's

appearance at future proceedings. This finding is buttressed by the specific examples in the 1949 and 1950 legislative history of the previous version of § 1252(a), as well as a November 7, 1983 rulemaking proceeding for the Regulations at issue.

At the rulemaking proceeding, as reflected by 48 Fed. Reg. 51142 (November 7, 1983),

> Many commentators contended that the no-work condition is contrary to the purpose of the appearance bond, which is to assure the appearance of the alien at a deportation or exclusion hearing. Most commentators who focused on this issue asserted that assuring appearance was the *only* purpose of the bond.

The INS asserted after this proceeding that:

> While it is true that most bond conditions are aimed at ensuring appearance of an alien there does not appear to be any reason under Section 242 of the Act to limit conditions of release.

Id. The INS relied on the Attorney General's broad interpretation of his authority in this matter in *Matter of Toscano-Rivas*, 14 I. & N. Dec. 550, 555 (A.G. 1974), in support of this proposition. This Court does not find *Toscano* persuasive, especially in light of the ambivalent language which permeates that case. For instance, the Attorney General states that "the pertinent statutory provisions authorize, *in at least some* circumstances, the inclusion in appearance-and-delivery bonds of conditions which bar unauthorized employment." *Id.* at 553 (emphasis added). In addition, the Attorney General proclaims that "it *may* be proper to impose [such bond conditions] upon aliens who become subject to deportation proceedings." *Id.* at 555 (emphasis added). Such

language is a far cry from a persuasive, well-documented argument.

The INS's reliance on *Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1952), in asserting that the Attorney General may condition release on the basis of protecting the public interest (i.e. American Labor) is misplaced.

Carlson involved a challenge to the Attorney General's power to hold five active Communists without bail pending the determination of their deportability. The Supreme Court examined the applicable deportation standards and found that in carrying out the policies and standards as to what aliens are subject to deportation, "the Attorney General is not left with untrammeled discretion as to bail . . . . He must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity." 342 U.S. 524, 543.

The *Carlson* Court examined the specific legislative scheme of Title I, § 2 of the Internal Security Act of 1950 and found that the statute granted the Attorney General discretion broad enough to justify his detention of the Communists. *Id.* at 541. The statute provides in relevant part:

> The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each

> State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

Internal Security Act, Title I, § 2 (15) (1950). Based on its examination of the legislative scheme, the *Carlson* Court found that this provision was,

> designed to eliminate the subversive activities of resident aliens who seek to inculcate the doctrine of force and violence into the political philosophy of the American people. To this end provision was made for the detention and deportation of certain non-citizens, including members of the Communist Party.

342 U.S. 544. Although the Court addressed the issue of securing the aliens' presence at future deportation proceedings, it found that the Communist threat to the national security was controlling: ". . . [W]e also take into consideration the factor of probable availability for trial, which we do not think is of great significance in cases involving security from Communist activities of alien Communists . . . ." *Id.* at 541 n.35.

The broad scope of discretionary power granted to the Attorney General by § 2 of the Internal Security Act is distinguishable from his power to impose bond conditions under the INA. As the Court of Appeals noted in *National Center for Immigrants' Rights, et al. v. Immigration and Naturalization Service, et al.*, —— F.2d —— (9th Cir., 84-5504, Sept. 20, 1984) (slip opinion at 9):

> In contrast to Congress' clear directives under the Internal Security Act in the area of national

> security, "the INA evinces 'at best evidence of peripheral concern with the employment of illegal entrants.'" *Sure-Tan, Inc. v. NLRB*, 104 S. Ct. 2803, 2809 (1984) (quoting *De Canas v. Bica*, 424 U.S. 351, 361 (1976)).

Furthermore, Supreme Court cases have demonstrated that *Carlson* is not applicable to this case. *Sure-Tan, Inc. v. NLRB*, 104 S. Ct. 2803 (1984) and *De Canas v. Bica*, 424 U.S. 351, 96 S. Ct. 933, 47 L. Ed. 43 (1976) cast doubt on the INS' assertion that the legislative scheme of the INA justifies the Attorney General's exercise of discretion to impose no-work conditions on release. The *De Canas* Court stated:

> The central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country. The comprehensiveness of the INA scheme for regulation of immigration and naturalization, without more, cannot be said to draw in the employment of illegal aliens as "plainly within . . . (that) central aim of federal regulation."

424 U.S. 351, 359 (emphasis added). *See also Sure-Tan, Inc.*, 104 S. Ct. 2803, 2809.

In light of *De Canas*, the INA cannot serve as the "legislative scheme" which authorizes the Attorney General, based upon the purpose of the protection of the domestic labor market, to impose no-work restrictions in appearance and delivery bonds. Therefore, this Court finds that the Attorney General's discretion to impose release conditions must be limited to those conditions which are related to securing the alien's presence at future deportation proceedings.

II. *Can the Attorney General impose a blanket no-work condition on all illegal aliens who are released on bond pending deportation proceedings?*

The INS asserts that it is within the Attorney General's authority to impose an employment prohibition on *all* release bonds as per § 1252(a). Thus, they argue that a blanket condition should apply, rather than a condition based upon individualized determinations.

Carlson does not lend credence to such an argument, and can be further distinguished from the instant case. In *Carlson*, there was evidence as to *each* individual,

> indicating that he was at the time of arrest a member of the Communist Party of the United States . . . and had participated . . . in the Party's indoctrination of others to the prejudice of the public interest.

342 U.S. 530. This evidence of membership and personal activity in the Communist Party for each alien justified the exercise of the Attorney General's discretion to deny bail. *Id.* at 541.

Moreover, the *Carlson* Court found that not all deportable aliens were denied bail under the 1950 Internal Security Act. *Id.* at 541-42. This should be contrasted with the INS Regulations which subject all arrested aliens to the no-work condition on bail unless the alien can overcome the heavy burden of proving "compelling reasons" for granting employment authorization.

This Court agrees with Justice Frankfurter's dissent in *Carlson* which states that the Attorney General's discretion to impose a condition based on an individualized determination is different from his authority to do so by means of a blanket rule:

> If the Attorney General, after the Internal Security Act, had made a general ruling that thereafter he would not allow bail to any alien against whom deportation proceedings were started and who was then a member of the Communist Party—an undiscriminating, unindividualized class determination—it would disregard the clear direction of Congress for this Court not to hold that the Attorney General had exceeded the limits of his discretion.

Id. at 558. It should be noted that this aspect of Justice Frankfurter's dissenting opinion is in consonance with the majority decision in *Carlson*, which was based upon evidence as to *each* individual.

Several other judicial and administrative interpretations have upheld the principle that the "factors relevant to the exercise of discretion are factors that pertain to each individual as an individual." *Id.* at 562. *See Rubinstein v. Brownell*, 206 F.2d 449, 455-56 (D.C. Cir. 1953) (detention of alien seeking judicial review of deportation order was improper when Attorney General made no showing that the alien would abscond or engage in subversive or criminal activity), *aff'd per curiam by an equally divided court*, 346 U.S. 929 (1954); *O'Rourke v. Warden*, 539 F. Supp. 1131, 1137 (S.D.N.Y. 1982) (court should review Board of Immigration Appeals' decision to deny bail to determine whether it has a reasonable foundation in the record); *Matter of Patel*, 15 I. & N. Dec. 2491 (an alien should not be detained or required to post bond except on a finding that he is a threat to the national security, or that he is a poor bail risk).

In addition, under the prior regulation, the INS required individualized determinations in each case

of the propriety of attaching a no-work condition to a bond. While the INS has the authority "in a *proper* case to impose a bond condition prohibiting unauthorized employment,"[4] it was not permittited in *Matter of Vea*, 15 I. & N. Dec. 2890 (BIA 1981). However, such a condition was upheld in *Matter of Chew*, 15 I. & N. Dec. 2910 (BIA 1982), based on a finding that it was "appropriate in this case." *Id.* at p. 265.

Therefore, this Court finds that the discretion of the Attorney General does not extend to the blanket imposition of a no-work condition on all aliens who are released on bond pending future deportation proceedings.

For the reasons discussed above, this Court finds that the Regulations have been promulgated beyond the statutory authority of the Attorney General and are therefore invalid. Accordingly, Summary Judgment is granted to the Plaintiffs.

Plaintiffs are asked to prepare proposed findings of fact and conclusions of law by March 15, 1985.

DATED: March 5, 1985

/s/ David V. Kenyon
DAVID V. KENYON
United States District Judge

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[4] *Matter of Vea*, 15 I. & N. Dec. 2890, p. 174.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-5504

D.C. No. CV 83-7927-KN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding
Argued and Submitted June 8, 1984

[Filed Sept. 28, 1984]

OPINION

Before: WRIGHT, FERGUSON and REINHARDT, Circuit Judges.

FERGUSON, Circuit Judge:

The Immigration and Naturalization Service (INS) appeals the district court's grant of a preliminary injunction restraining the INS from applying a new regulation which became effective December 7, 1983.

The previous INS regulations provided that in his discretion the District Director, with the prior approval of the INS Regional Commissioner, could include a condition barring unauthorized employment in an appearance and delivery bond in connection with deportation proceedings. 8 C.F.R. § 103.6(a)(2)(ii) (1983). In the regulation now being challenged, the INS does away with individualized determinations. The new regulation provides in part that "[a] condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding. . . . Only those aliens who upon application . . . establish compelling reasons for granting employment authorization may be authorized to accept employment." 8 C.F.R. §§ 103.6(a)(2)(ii)-(iii), 109.1(b)(8) (1984).[1]

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[1] The new regulation states:

§ 103.6 Surety bonds.

(a) . . . .

(2) *Bond riders*—(i) *General.* Bond riders shall be prepared on Form I-351 and attached to Form I-352. If a condition to be included in a bond is not on Form I-351, a rider containing the condition shall be executed.

(ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate.

(iii) *Factors to be considered.* Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:

On December 6, 1983, the plaintiffs brought suit to block implementation of the new regulation. The plaintiffs (referred to collectively as NCIR) include a number of nonprofit organizations which provide legal services to aliens with immigration problems and whose members and clients would be affected by the regulation, a United Auto Workers Union local affiliate, and 16 individuals currently in deportation proceedings. NCIR challenges the validity of the regulation under several different theories—that the regulation is without statutory authority, that it is not reasonably related to the purpose of assuring a detainee's appearance at future deportation proceedings, that it was promulgated unlawfully, that it violates fifth amendment due process and equal protec-

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(A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;

(B) Prior immigration violations by the alien;

(C) Whether there is a reasonable basis for considering discretionary relief; and

(D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.

§ 109.1 Classes of aliens eligible.

. . . .

(b) . . . .

(8) Any excludable or deportable alien who has posted an appearance and delivery bond may be granted temporary employment authorization if the District Director determines that employment is appropriate under § 103.6 (a) (2) (iii) of this chapter.

. . . .

(Sec. 103 of the Immigration and Nationality Act, as amended (8 U.S.C. 1103))

Title 8, Code of Federal Regulations.

tion guarantees, and that it is inconsistent with and superseded by other federal laws.

On December 8, 1983, following a hearing, the district court denied a temporary restraining order and scheduled a hearing on NCIR's motion for a preliminary injunction. After hearing evidence and testimony on December 16, 1983, the court granted an injunction against enforcement of the regulation. Addressing only two of NCIR's theories, the court concluded that NCIR has a fair chance of showing that the regulation is invalid because it is inconsistent with the statute and because it violates due process guarantees. The district court further found that the harm to the plaintiffs from application of the regulation would be irreparable. It noted that individuals subjected to the no-work condition will be unable to support themselves and their dependents pending their deportation hearings and will have more difficulty obtaining bonds and counsel. The court found that this harm clearly outweighed the government's harm from delay in implementing the regulation.

DISCUSSION

Jurisdiction of the District Court

The INS raises a two-pronged threshold attack on the district court's jurisdiction. First, the INS asserts that judicial review is available only through the habeas corpus provisions of 8 U.S.C. § 1252(a). Second, the INS argues that this case is not ripe for adjudication.

The INS characterizes NCIR's challenge to the regulation as involving determinations concerning release on bond and thus as encompassed within the

habeas corpus provision of section 1252(a), which states in part:

> Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

Precisely drawn statutory procedures, such as this habeas corpus procedure, are generally held to preempt more general grants of jurisdiction in cases to which they apply. *See, e.g., Brown v. GSA*, 425 U.S. 820, 834 (1976). The INS states that the legislative history shows Congress' intent to make section 1252 (a) an exclusive remedy:

> An alien arrested and taken into custody may, pending the final determination of deportability, be continued in custody, released on bond or released on conditional parole, and the determination of the Attorney General concerning such detention, release on bond or parole shall be subject to judicial review *only* upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with reasonable dispatch to determine deportability.

H.R. Rep. No. 1365, 82d Cong., 2d Sess. 57, *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1711-12 (emphasis added). Since this suit was not brought as a habeas corpus action pursuant to section 1252

(a), the INS argues that the district court lacked jurisdiction.

However, we conclude that section 1252(a) is inapplicable to this case. Section 1252(a) deals only with complaints about delays in determining deportability in individual cases. In *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982), *disapproved on other grounds, Jean v. Nelson*, 727 F.2d 957, 976 n.27 (11th Cir. 1984) (en banc), the court drew a distinction between jurisdiction to rule on the merits of an individual deportation order and jurisdiction to rule on a pattern and practice of constitutional violations. The court held that although 8 U.S.C. § 1105(a) gave courts of appeals exclusive jurisdiction to review alleged procedural irregularities in an individual deportation hearing, an allegedly unlawful pattern, program, or scheme of immigration officials was subject to examination by the district court under federal question jurisdiction. *Id.* at 1033. Here, the NCIR challenges the imposition of an automatic employment prohibition in all release bonds on statutory and constitutional grounds. In its prayer for relief, NCIR does not seek a review on the merits of any individual determination by the INS regarding release on bond. *See id.* at 1033 n.23. Thus, the district court properly has jurisdiction under 28 U.S.C. § 1331 to examine the merits of NCIR's challenges and to enter declaratory and injunctive relief. The district court is also given jurisdiction over claims arising under the immigration statutes. 8 U.S.C. § 1329.

The INS also asserts that this challenge to the regulation is not ripe, arguing that because one of NCIR's major contentions is that the procedures used in applying the regulation are inadequate, the court

should await a more concrete case which may throw more light on the statutory and practical justifications for the regulation. *See, e.g., Toilet Goods Association, Inc. v. Gardner*, 387 U.S. 158 (1967).

The relevant considerations in determining whether a challenge to administrative action is ripe are (1) whether the issues are fit for judicial determination, and (2) the hardship to the parties from withholding consideration. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The district court found that both considerations warranted present judicial review. The issues are "fit" for decision because the regulation is presently being enforced and is unquestionably final, because nothing in the Act precludes present review, and because the issues presented do not require further factual development by the administrative process. *See id.* More important, the district court found that the individual plaintiffs were suffering a significant and immediate hardship from the regulation. The court correctly concluded that the issue was ripe.

Standard of Review

We reverse an order issuing or denying a preliminary injunction only if the district court abused its discretion or based its decision in its preliminary review of the merits on erroneous legal principles. *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980).

To obtain a preliminary injunction, the moving party must demonstrate either (1) probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships sharply favors the moving party.

Beltran v. Myers, 677 F.2d 1317, 1320 (9th Cir. 1982). These are not separate tests, but are the ends of a continuum; the greater the relative hardship to the moving party, the less probability of success must be shown. *Benda v. Grand Lodge of the International Association of Machinists*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979).

When, as here, the plaintiffs have shown that the balance of hardships sharply favors their side, the district court need only conclude that the plaintiffs have raised "serious questions" to justify the grant of a preliminary injunction. *Beltran*, 677 F.2d at 1320. The INS does not challenge the court's finding that the balance of hardship clearly favors the plaintiffs. The hardship from being unable to work to support themselves and their dependents, to obtain release bonds, and to pay for legal representation is beyond question.

The INS requests that this court decide the merits of the case because the validity of the regulation is a question of law reviewable de novo. We decline to do so. The only conclusion of law entered by the district court is that NCIR has a fair chance of prevailing on the merits on two of its arguments. The parties have not had the benefit either of a full opportunity to present their cases or of a final judicial decision on the merits of the controversy. *See University of Texas v. Camenisch*, 451 U.S. 390, 396 (1981). This court thus limits its review of the merits to determining whether the district court abused its discretion by concluding that NCIR had a fair chance of success. *See, e.g., Sports Form, Inc. v. UPI*, 686 F.2d 750, 752 (9th Cir. 1992). *See also Otero Savings & Loan Association v. Federal Reserve Bank of Kansas City*, 665 F.2d 275, 277 (10th Cir.

1981) (review on merits is limited to extraordinary cases in which trial court has ruled on a motion for preliminary injunction based on a final interpretation of the law as applied to undisputed facts).

Is the Regulation in Accordance with the Immigration and Nationality Act?

The district court found merit in NCIR's argument that a condition of release must be related to securing the detainee's presence at future deportation proceedings. *See, e.g., Matter of Patel*, 15 I&N Dec. 666 (BIA 1976). Section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252(a), authorizes the Attorney General to set conditions for release on bond:

> Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. And such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. . . .

The INS asserts that this Act gives the Attorney General "untrammeled" authority to impose any release conditions reasonably related to the purposes of the Act, and that a major purpose of the Act is to protect the American labor force by precluding aliens from engaging in unauthorized employment. The INS relies on 8 U.S.C. §§ 1101(a)(15), 1182(a)(14) for this proposition. Thus, the INS argues, prohibiting employment pending deportation hearing is consistent with the overall legislative scheme.

To support this argument, the INS relies primarily on *Carlson v. Landon*, 342 U.S. 524 (1952). *Carlson* involved a challenge to the Attorney General's decision to hold five active alien Communists without bail pending determination of their deportability. *Carlson* does not conclusively control this case for two reasons. First, in *Carlson*, the Attorney General justified the exercise of his discretion to deny bail "by reference to the legislative scheme to eradicate the evils of Communist activity." *Carlson*, 342 U.S. at 543. The Supreme Court stated that "[a]s the purpose of the Internal Security Act to deport all alien Communists as a menace to the security of the United States is established by the Internal Security Act itself, Title I, § 2, we conclude that the discretion as to bail in the Attorney General was certainly broad enough to justify his detention of all these parties without bail as a menace to the public interest." *Carlson*, 342 U.S. at 541. In contrast to Congress' clear directives under the Internal Security Act in the area of national security, "[t]he INA evinces 'at best evidence of peripheral concern with employment of illegal entrants.'" *Sure-Tan, Inc. v. NLRB*, 104 S. Ct. 2803, 2809 (1984) (quoting *De Canas v. Bica*, 424 U.S. 351, 360 (1976)). Congress has not made it a criminal offense for an alien to accept employment after entering this country without proper authorization. *Sure-Tan*, 104 S. Ct. at 2809.

Second, in *Carlson*, there was evidence as to each of the aliens of "membership plus personal activity in supporting and extending the Party's philosophy concerning violence" which justified the exercise of the Attorney General's discretion to deny bail. *Carlson*,

342 U.S. at 541. The Court noted that not all persons arrested as deportable under the Internal Security Act are denied bail. *Id.* at 541-42. The discretion of the Attorney General to impose a condition on a particularized showing in an individual case is quite different from the authority to do so by a blanket rule. As Justice Frankfurther observed:

> If the Attorney General, after the Internal Security Act, had made a general ruling that thereafter he would not allow bail to any alien against whom deportation proceedings were started and who was then a member of the Communist Party—an undiscriminating, unindividualized class determination—it would disregard the clear directive of Congress for this Court not to hold that the Attorney General had exceeded the limits of discretion.

Id. at 558 (Frankfurter, J., dissenting). Cf. *Rubinstein v. Brownell*, 206 F.2d 449, 455-56 (D.C. Cir. 1953) (detention of alien seeking judicial review of deportation order was improper when Attorney General made no showing that the alien would abscond or engage in subversive or criminal activity), *aff'd per curiam by an equally divided court*, 346 U.S. 929 (1954). *See also O'Rourke v. Warden*, 539 F. Supp. 1131, 1137 (S.D.N.Y. 1982) (court should review whether agency's decision to deny bail is supported by or has reasonable foundation in the record). In conformity with these authorities, under the prior regulation the INS required specific, individualized information to justify an employment prohibition condition in each case. *Matter of Vea*, Interim Decision #2890 at 5 (BIA 1981); *Matter of Leon-Perez*, 15 I&N Dec. 239 (BIA 1975); 8 C.F.R. § 103.6(a)(2) (1983).

In addition to arguing that the Attorney General's discretion does not extend to imposing a blanket condition such as this one, NCIR argues that the nonemployment condition is not rationally related to the statutory purpose of protecting domestic labor. At the preliminary injunction hearing, NCIR introduced expert testimony and evidence tending to show that employment by aliens awaiting deportation proceedings does not affect American unemployment. The district court has not yet made any findings or conclusions based on that evidence.

We decline to discuss the other arguments advanced by the INS because we agree with the district court that NCIR has a fair chance of prevailing on the merits of its argument that the regulation is invalid because it is not related to the purposes of the Act and does not require individualized determinations.[2] Under the law of this circuit, NCIR was thus entitled to a preliminary injunction. *Los Angeles Memorial Coliseum Commission*, 634 F.2d at 1200.

Necessity for Class Certification

NCIR framed its complaint as a class action suit, but did not move for class certification prior to the preliminary injunction. The district court enjoined

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[2] The NCIR also contends that detained aliens have a protected liberty interest under the fifth amendment in working until their deportability is determined in a due process hearing. In addition, plaintiffs argue that the regulation violates their due process rights under the fifth amendment because it lacks procedures by which an alien may obtain employment authorization. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). Although we need not decide these questions here, we agree with the district court that plaintiffs' arguments have some merit.

the INS from applying the regulation without making any findings as to class membership.

The INS asserts that in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs. We agree. *See, e.g., Hollon v. Mathis Independent School District*, 491 F.2d 92 (5th Cir. 1974) (when suit was brought by individual challenging school regulations, a preliminary injunction enjoining enforcement of the regulation against anyone else went further than necessary to serve the purpose of maintaining the parties' status quo pending trial on the merits); *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974) ("Relief cannot be granted to a class before an order has been entered determining that class treatment is proper"); *Tape Head Co. v. RCA*, 452 F.2d 816, 819 (10th Cir. 1971).

We therefore remand for possible modification of the injunction because on the basis of the present record its scope is too broad. On remand, if the district court fails to certify a class of plaintiffs, it must limit the injunction to apply to the named plaintiffs only.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. Cv. 83-7927 Kn (JRx)

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL., PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

[Filed Dec. 16, 1983]

ORDER RE: PRELIMINARY INJUNCTION

The Court, having heard argument from counsel on December 16, 1983, with respect to plaintiffs' Motion for Preliminary Injunction, and having considered the points and authorities and declarations filed therewith,

IT IS HEREBY ORDERED that plaintiffs' motion is granted.

Initially, the Court must determine the jurisdictional issues of ripeness and standing. Also, prior to reaching a decision on the merits of the preliminary injunction, the Court must decide whether, in its

discretion, plaintiffs should be required to exhaust their administrative remedies before coming to this Court for a judicial determination.

I. *RIPENESS*

In determining whether an issue is ripe for judicial decision the Supreme Court has articulated two relevant considerations: (1) whether the issues are fit for judicial decision and (2) what will be the hardship to the parties if this Court were to withhold its consideration. *Abbott Laboratories* v. *Gardener*, 387 U.S. 136, 149 (1976); *Pacific Gas and Electric* v. *State Energy Res. Conservation*, ——U.S. —— 103 S.Ct. 1713, 1720 (1983). This Court finds that both of these considerations warrant the assertion of jurisdiction at the present time.

Four attributes of the issues in this litigation necessitate the conclusion that these issues are as fit for judicial decision as were the issues in *Abbott Laboratories*. First, in *Abbott* the regulation had not yet been enforced, although the Court still found the agency action to be "final" for purposes of review under the Administrative Procedure Act. In this action, because the regulation is presently being enforced, no question exists as to its finality. Second, similar to the Food, Drug, and Cosmetic Act underlying the *Abbott Laboratories* action, this Court does not find that the Immigration and Nationality Act precludes review of this no-work bond condition at this time. The exhaustion of administrative remedies requirement provided for in § 106(c) only applies to "an order of deportation or of exclusion", not to the conditions of a bond that would be imposed prior to such an order. 8 U.S.C. § 1105a(c). Third, issues presented in this action do not require

further factual development by the administrative process and will be dispositive of plaintiffs' claim.

As to the second *Abbott* consideration, it is clear that the impact on the plaintiffs or their members is "significant and immediate". *Kerr-McGee Chemical Corp.* v. *U.S. Dept. of the Interior*, 709 F.2d 597, 600 (9th Cir. 1983). At a minimum, individuals subjected to the no-work condition will be unable to work and support themselves until the District Director or Immigration Judge determines that they may do so. Further, the potential impact on these individuals also includes more difficulty in obtaining bonds and counsel as well as significantly affecting those dependent upon the alleged illegal alien. Beginning on December 7, 1983, these hardships were being felt. Certainly this hardship to the parties if judicial consideration was withheld at the present time, coupled with the fitness of the issues for judicial decision, compels the Court to conclude that the case is ripe for judicial determination.

II. *STANDING*

Each association has standing to bring this action on behalf of its members if:

(a) its members would otherwise have standing to sue in their own rights;

(b) the interests it seeks to protect are germane to the organization's purpose; and

(c) neither the claim nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. *Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977). The plaintiff associations have demonstrated that each of these elements is present. First, they have established that their

"members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). Members of the plaintiff organizations have been, are continuing to be, and will in the future be subject to this no-work bond condition. Even though this bond condition may be removed on a case-by-case basis, until it is removed, the individual is suffering immediate injury. Second, there has been no argument presented by the defendant that the interests these organizations are seeking to protect are not germane to the organizations' purposes. To the contrary, it appears to this Court that such interests are germane to these purposes. Third, plaintiffs are only seeking injunctive and declaratory relief. Where plaintiffs are only seeking such prospective relief, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth* v. *Seldin*, 422 U.S. at 515. Hence, this Court does not need the participation of individual members to provide the relief requested.

As to the individual plaintiffs, the Court finds that they are also confronted with immediate or threatened injury and therefore have standing to bring this action. They have either been subject to this no-work condition as a part of their release on bond or they are threatened with the immediate injury already described.

III. *EXHAUSTION OF ADMINISTRATIVE REMEDIES*

As noted above, there is no statutory provision requiring plaintiffs to exhaust administrative remedies

before seeking judicial determination. Therefore, whether plaintiffs should be required to exhaust administrative remedies is left to the sound discretion of this Court. *Kale* v. *United States*, 489 F.2d 449, 454 (9th Cir. 1973). In exercising this discretion, the Ninth Circuit has instructed the Court to balance "the interests of the agency in applying its expertise, correcting its own errors, making a proper record, enjoying appropriate independence of decision and maintaining an administrative process free from deliberate flouting, and the interests of private parties in finding adequate redress for their grievances." *Montgomery* v. *Rumsfeld*, 572 F.2d 250, 253 (9th Cir. 1978).

In the context of the pending action, this balance clearly favors the plaintiffs. It is clear that the administrative decisionmakers will not be able to decide the constitutional questions raised by plaintiffs. More importantly, the determinative statutory and constitutional issues that comprise this action neither depend upon the expertise of the agency nor require the making of a further administrative record. Perhaps of paramount importance, the very harm that this Court seeks to prevent is the continuation of administrative proceedings while the private party to the proceedings is not allowed to work. In this situation, the immediate redress for the plaintiffs plainly outweighs any agency interest that could be asserted.

IV. *PRELIMINARY INJUNCTION*

The grant or denial of a preliminary injunction rests in the discretion of the trial court. *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282 (1940); *County of Santa Barbara* v. *Hickel*, 426 F.2d 164 (9th Cir. 1970). Since a preliminary injunction is

an extraordinary remedy, it should not be granted unless the moving party, by a clear showing, carries the burden of persuasion. *Sierra Club* v. *Hickel*, 433 F.2d 24 (9th Cir. 1970), *aff'd.*, 405 U.S. 727 (1972).

There are two tests in the Ninth Circuit which are used to determine whether a preliminary injunction should issue. The first test requires the court to look at the following factors:

(1) whether the moving party will suffer irreparable injury if injunctive relief is not granted;

(2) the probability of success on the merits;

(3) whether, in balancing the equities, the non-moving party is harmed more by the injunction than the moving party is helped; and

(4) whether granting the injunction is in the public interest.

Sierra Club v. *Hickel*, *supra*, at 33.

The second test, developed in the Second Circuit and adopted in the Ninth Circuit as an alternative test, requires the moving party to meet the burden of demonstrating *either*:

(1) a combination of probable success and the possibility of irreparable injury, *or*

(2) that serious questions are raised and the balance of hardships tips sharply in the moving party's favor.

Charlie's Girls, Inc. v. *Revlon, Inc.*, 483 F.2d 953 (2d Cir. 1973); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975).

Under the alternative test, it is not necessary that the moving party be reasonably certain to succeed on the merits. If the harm that may occur to the moving party is sufficiently serious, it is only necessary that there be a fair chance of success on the merits. *Semmes Motors, Inc.* v. *Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970); *Costandi* v. *AAMCO Automatic Transmissions, Inc.*, 456 F.2d 941 (9th Cir. 1972).

In considering the showing which plaintiffs must make in order for this Court to grant a preliminary injunction, the Court focuses on two of plaintiffs' arguments: (1) whether the no-work condition of the bond must be relevant to the purpose of securing the appearance of the alien at the deportation hearing and (2) whether the contested regulations deprive aliens of their due process rights under the Fifth Amendment because they are automatically denied the right to work.

The Court believes that plaintiffs have a fair chance of succeeding on their argument that the no-work condition is not in accordance with statutory intent and constitutional requirements. The Court finds merit in the argument that any conditions imposed on the bond must be relevant to the purpose of securing the appearance of the alien at his deportation proceeding. *Matter of Patel*, Interim Decision No. 2491 (1976).

As to the second argument, the due process claim, the Court finds that plaintiffs have a fair chance of success on the merits. In order to show a deprivation of due process, plaintiffs must show that (1) they had a "liberty" or "property" interest and (2) that it was deprived without due process of law.

It is undisputed that the right to work is a "liberty interest." *Greene* v. *McElroy*, 360 U.S. 474,

492 (1952). Defendants contend that detained individuals do not have this right to work because of their status as illegal aliens. However, this argument assumes the very fact which the government has the burden of proving and has not yet done so. *Woodby* v. *INS*, 385 U.S. 276, 286 (1966). The Court believes that plaintiffs have a fair chance of showing at trial that the detained individuals are entitled to this right until the government proves their illegal status.

Under the contested regulations, plaintiffs are automatically denied this right to work as a condition of posting bond. The individual may obtain work authorization upon a showing of "compelling reasons" to the District Director, 8 C.F.R. § 103.6(a)(2)(iii), or through a bond reduction hearing before the Immigration Judge. In determining whether the regulations comport with due process, the Supreme Court in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), sets forth the following three factors to consider: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards: and (3) the government's interest.

The private interest at stake is the prohibition against employment pending deportation or a decision by the District Director or an Immigration Judge allowing the individual to work. In terms of the risk of erroneous deprivation, the Court observes that *all* aliens who post bond are automatically subjected to the no-work condition. Evidence presented indicates that the delay between the earliest time the detainee could be released and a review of the bond

condition by the Immigration Judge varies from a few hours to several weeks, largely depending upon the location of the hearing. While the evidence shows that a review by a District Director is generally obtainable on much shorter notice, the evidence at this point clearly indicates that this review is not designed to comport with due process requirements. Also, plaintiffs have raised serious questions as to the procedural sufficiency of the bond reduction hearings before the Immigration Judge. Based on these findings, the Court believes that a significant risk of erroneous deprivation prior to a due process hearing may exist. Finally, the government asserts that the interest at stake is the protection of the American labor force. While this Court need not determine at this time whether the government interest outweighs the private interest, or vice versa, the Court concludes that plaintiffs have at least a fair chance of proving at trial that the *Mathews* v. *Eldridge* factors weigh in their favor.

With respect to the injury element of the preliminary injunction standards, there is sufficient evidence of the possibility that the regulations will impose irreparable harm to those who fall within the purview of the no-work condition. The Court has made note of some of the kinds of harm that will arise from the contested regulations in its analysis of the ripeness issue above. Balancing this harm with the harm to the government, the Court recognizes the vital importance of protecting the American labor force. However, the Court notes that this problem has existed for several decades. In terms of the time between the issuance of this preliminary injunction and the trial, the Court believes that the immediate hardship to the plaintiffs clearly outweighs the hard-

ships to the government caused by a reasonable delay in the implementation of these regulations: The Court therefore finds that plaintiffs have satisfied the requirements for the issuance of a preliminary injunction under the tests employed in this Circuit.

WHEREFORE, IT IS ADJUDGED AND DECREED that defendants, their employees, agents and successors in office are preliminarily enjoined from enforcing 8 C.F.R. § 103.6(a)(2) (ii) and (iii) (1983) and 109.1(b)(8) (1983), which became effective December 7, 1983 (Federal Register, Vol. 48, No. 216, Pages 51142-44 (November 7, 1983)) or informing detainees that such regulations are in effect. Any such conditions already imposed pursuant to the new regulations shall be stricken.

Plaintiffs' attorney is ordered to prepare Findings of Fact and Conclusions of Law and submit them to this Court not later than January 3, 1984.

DATED: This 16th day of December, 1983.

/s/ David V. Kenyon
DAVID V. KENYON
United States District Judge

APPENDIX H

8 U.S.C. 1103(a) provides:

Powers and duties of the Attorney General and Commissioner; appointment of Commissioner

The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter. He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service. He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper. He is authorized to confer or impose upon any employee of the United States, with

the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service. He may, with the concurrence of the Secretary of State, establish officers of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries.

8 U.S.C. 1182 provides in pertinent part:

Excludable aliens

(a) **General classes**

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the

wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(7) of this title;

* * * * *

8 U.S.C. 1251 provides in pertinent part—

Deportable aliens

(a) **General classes**

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

8 U.S.C. 1252 provides in pertinent part—

Apprehension and deportation of aliens

(a) **Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congressional committees**

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Except as provided in paragraph (2)[[regarding mandatory detention of aliens convicted of aggravated felonies], any such alien taken into custody may, in the discretion of the Attorney General and

pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

8 C.F.R. 103.6 provides:

Surety bonds.

(a) *Posting of surety bonds*—(1) *Extension agreements; consent of surety; collateral security.* All surety bonds posted in immigration cases shall be executed on Form I-352, a copy of which, and any rider attached thereto, shall be furnished the obligor. A district director is authorized to approve a bond, a formal agreement to extension of liability of surety, a request for delivery of collateral security to a duly appointed and undischarged administrator or executor of the estate of a deceased depositor, and a power of attorney executed on Form I-312. All other matters relating to bonds, including a power of attorney not executed on Form I-312 and a request for delivery of collateral security to other than the depositor or his approved attorney in fact, shall be forwarded to the regional commissioner for approval.

(2) *Bond riders*—(i) *General.* Bond riders shall be prepared on Form I-351 and attached to Form I-352. If a condition to be included in a bond is not on Form I-351, a rider containing the condition shall be executed.

(ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate.

(iii) *Factors to be considered.* Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:

(A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;

(B) Prior immigration violations by the alien;

(C) Whether there is a reasonable basis for considering discretionary relief; and

(D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.

(b) *Acceptable sureties.* Either a company holding a certificate from the Secretary of the Treasury under 6 U.S.C. 6-13 as an acceptable surety on Federal bonds, or a surety who deposits cash or U.S. bonds or notes of the class described in 6 U.S.C. 15 and Treasury Department regulations issued pursuant thereto and which are not redeemable within 1 year from the date they are offered for deposit is an acceptable surety.

(c) *Cancellation*—(1) *Public charge bonds.* A public charge bond posted for an immigrant shall be cancelled when the alien dies, departs permanently from the United States or is naturalized, provided the immigrant did not become a public charge prior to death, departure, or naturalization. The district director may cancel a public charge bond at any time if he/she finds that the immigrant is not likely to become a public charge. A bond may also be cancelled in order to allow substitution of another bond. A public charge bond shall be cancelled by the district director upon review following the fifth anniversity of the admission of the immigrant, provided that the alien has filed Form I-356, Request for Cancellation of Public Charge Bond, and the district director finds that the immigrant did not become a public charge prior to the fifth anniversary. If Form I-356 is not filed, the bond shall remain in effect until the form is filed and the district director reviews the evidence supporting the form and renders a decision to breach or cancel the bond.

(2) *Maintenance of status and departure bonds.* When the status of a nonimmigrant who has violated the conditions of his admission has been adjusted as a result of administrative or legislative action to that of a permanent resident retroactively to

a date prior to the violation, any outstanding maintenance of status and departure bond shall be canceled. If an application for adjustment of status is made by a nonimmigrant while he is in lawful temporary status, the bond shall be canceled if his status is adjusted to that of a lawful permanent resident or if he voluntarily departs within any period granted to him. As used in this paragraph, the term "lawful temporary status" means that there must not have been a violation of any of the conditions of the alien's nonimmigrant classification by acceptance of unauthorized employment or otherwise during the time he has been accorded such classification, and that from the date of admission to the date of departure or adjustment of status he must have had uninterrupted Service approval of his presence in the United States in the form of regular extensions of stay or dates set by which departure is to occur, or a combination of both. An alien admitted as a nonimmigrant shall not be regarded as having violated his nonimmigrant status by engaging in employment subsequent to his proper filing of an application for adjustment of status under section 245 of the Act and Part 245 of this chapter. A maintenance of status and departure bond posted at the request of an American consular officer abroad in behalf of an alien who did not travel to the United States shall be canceled upon receipt of notice from an American consular officer that the alien is outside the United States and the nonimmigrant visa issued pursuant to the posting of the bond has been canceled or has expired.

(3) *Substantial performance.* Substantial performance of all conditions imposed by the terms of a bond shall release the obligor from liability.

(d) *Bond schedules*—(1) *Blanket-bonds for departure of visitors and transits.* The amount of bond required for various numbers of nonimmigrant visitors or transits admitted under bond on Forms I-352 shall be in accordance with the following schedule:

Aliens

1 to 4—$500 each.
5 to 9—$2,500 total bond.
10 to 24—$3,500 total bond.
25 to 49—$5,000 total bond.
50 to 74—$6,000 total bond.
75 to 99—$7,000 total bond.
100 to 124—$8,000 total bond.
125 to 149—$9,000 total bond.
150 to 199—$10,000 total bond.
200 or more—$10,000 plus $5 for each alien over 200.

(2) *Blanket bonds for importation of workers classified as nonimmigrants under section 101(a)(15)(H).* The following schedule shall be employed by district directors when requiring employers or their agents or representatives to post bond as a condition to importing alien laborers into the United States from the West Indies, the British Virgin Islands, or from Canada:

Less than 500 workers—$15 *each*
500 to 1,000 workers—$10 *each*
1,000 or more workers—$5 *each*

A bond shall not be posted for less than $1,000 or for more than $12,000 irrespective of the number of workers involved. Failure to comply with conditions of the bond will result in the employer's liability in

the amount of $200 as liquidated damages for each alien involved.

(e) *Breach of bond.* A bond is breached when there has been a substantial violation of the stipulated conditions. A final determination that a bond has been breached creates a claim in favor of the United States which may not be released or discharged by a Service officer. The district director having custody of the file containing the immigration bond executed on Form I-352 shall determine whether the bond shall be declared breached or cancelled, and shall notify the obligor on Form I-323 or Form I-391 of the decision, and, if declared breached, of the reason therefor, and of the right to appeal in accordance with the provisions of this part.

8 C.F.R. 274a.12 provides:

Classes of aliens authorized to accept employment.

(a) *Aliens authorized employment incident to status.* Pursuant to the statutory or regulatory reference cited, the following classes of aliens are authorized to be employed in the United States without restrictions as to location or type of employment as a condition of their admission or subsequent change to one of the indicated classes, and specific employment authorization need not be requested:

(1) An alien who is a lawful permanent resident (with or without conditions pursuant to section 216 of the Act), as evidenced by Form I-151 or Form I-551 issued by the Service;

(2) An alien admitted to the United States as a lawful temporary resident pursuant to section 245A or 210 of the Act, as evidenced by an employment authorization document issued by the Service;

(3) An alien admitted to the United States as a refugee pursuant to section 207 of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service;

(4) An alien paroled into the United States as a refugee for the period of time in that status, as evidenced by an employment authorization document issued by the Service;

(5) An alien granted asylum under section 208 of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service;

(6) An alien admitted to the United States as a nonimmigrant fiance or fiancee pursuant to section 101(a)(15)(K) of the Act, or an alien admitted as the child of such alien, for the period of admission of the United States, as evidenced by an employment authorization document issued by the Service;

(7) An alien admitted as a parent (N-8) or dependent child (N-9) of an alien granted permanent residence under section 101(a)(27)(I) of the Act, as evidenced by an employment authorization document issued by the Service;

(8) An alien admitted to the United States as a citizen of the Federated States of Micronesia (CFA/FSM) or of the Marshall Islands (CFA/MIS) pursuant to agreements between the United States and the former trust territories, as evidenced by an employment authorization document issued by the Service;

(9) An alien granted suspension of deportation under section 244(a) of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service;

(10) An alien granted withholding of deportation under section 243(h) of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service; or

(11) An alien who has been granted extended voluntary departure by the Attorney General as a member of a nationality group pursuant to a request by the Secretary of State. Employment is authorized for the period of time in that status as evidenced by an employment authorization document issued by the Service.

(b) *Aliens authorized for employment with a specific employer incident to status.* The following classes of nonimmigrant aliens are authorized to be employed in the United States by the specific employer and subject to the restrictions described in the section(s) of this chapter indicated as a condition of their admission in; or subsequent change to, such classification. An alien in one of these classes is not issued an employment authorization document by the Service:

(1) A foreign government official (A-1 or A-2), pursuant to § 214.2(a) of this chapter. An alien in this status may be employed only by the foreign government entity;

(2) An employee of a foreign government official (A-3), pursuant to § 214.2(a) of this chapter. An alien in this status may be employed only by the foreign government official;

(3) A foreign government official in transit (C-2 or C-3), pursuant to § 214.2(c) of this chapter. An alien in this status may be employed only by the foreign government entity;

(4) A nonimmigrant crewman (D-1 or D-2) pursuant to § 214.2(d), and Parts 252 and 253, of this

chapter. An alien in this status may be employed only in a crewman capacity on the vessel or aircraft of arrival, or on a vessel or aircraft of the same transportation company, and may not be employed in connection with domestic flights or movements of a vessel or aircraft;

(5) A nonimmigrant treaty trader (E-1) or treaty investor (S-2), pursuant to § 214.2(e) of this chapter. An alien in this status may be employed only by the treaty-qualifying company through which the alien attained the status. Employment authorization does not extend to the dependents of the principal treaty trader or treaty investor (also designated "E'1" or "E-2"), other than those specified in paragraph (c)(2) of this section;

(6) A nonimmigrant student (F-1) who is in valid non-immigrant student status and pursuant to 8 CFR 214.2(f) is seeking on-campus employment for not more than twenty hours per week while school is in session or full time when school is not in session if the student intends and is eligible to register for the next term or session. Part-time on campus employment is authorized by the school and no specific endorsement by a school official or Service officer is necessary.

(7) A representative of an international organization (G-1, G-2, G-3, or G-4), pursuant to § 214.2(g) of this chapter. An alien in this status may be employed only by the foreign government entity or the international organization;

(8) A personal employee of an official or representative of an international organization (G-5), pursuant to § 214.2(g) of this chapter. An alien in this status may be employed only by the official or representative of the international organization;

(9) A temporary worker or trainee (H-1, H-2A, H-2B, or H-3), pursuant to § 214.2(h) of this chapter. An alien in this status may be employed only by the petitioner through whom the status was obtained;

(10) An information media representative (I), pursuant to § 214.2(i) of this chapter. An alien in this status may be employed only for the sponsoring foreign news agency or bureau. Employment authorization does not extend to the dependents of an information media representative (also designated "I");

(11) An exchange visitor (J-1), pursuant to § 214.2(j) of this chapter and 22 CFR 514.24. An alien in this status may be employed only by the exchange visitor program sponsor or appropriate designee and within the guidelines of the program approved by the United States Information Agency as set forth in the Certificate of Eligiblity (Form IAP-66) issued by the program sponsor;

(12) An intra-company transfereee (L-1), pursuant to § 214.2(1) of this chapter. An alien in this status may be employed only by the petitioner through whom the status was obtained;

(13) Officers and personnel of the armed services of nations of the North Atlantic Treaty Organization and representatives, officials, and staff employees of NATO (NATO-1, NATO-2, NATO-3, NATO-4, NATO-5 and NATO-6), pursuant to § 214.2(o) of this chapter. An alien in this status may be employed only by NATO;

(14) An attendant, servant or personal employee (NATO-7) of an alien admitted as a NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, or NATO-6, pursuant to § 214.2(o) of this chapter. An alien admitted under this classification may be employed only by the NATO alien through whom the status was obtained; or

(15) A nonimmigrant alien within the class of aliens described in paragraphs (b)(2), (5), (8), (9), (10), (11), and (12) of this section whose status has expired but who has filed a timely application for an extension of such status pursuant to § 214.2 of this chapter. These aliens are authorized to continue employment with the same employer for a period not to exceed 120 days beginning on the date of the expiration of the authorized period of stay. If the alien's application for extension of stay has not been adjudicated within this period, the alien may apply to the district director for employment authorization pursuant to paragraph (c)(15) of this section.

(16) A nonimmigrant pursuant to section 214(e) of the Act. An alien in this status must be engaged in business activities at a professional level in accordance with the provisions of Chapter 15 of the United States-Canada Free-Trade Agreement (FTA).

(c) *Aliens who must apply for employment authorization.* Any alien within a class of aliens described in this section must apply for work authorization. If authorized, such an alien may accept employment subject to any restrictions indicated in the regulations or cited on the employment authorization document:

(1) An alien spouse or unmarried dependent, child, son or daughter of a foreign government official (A-1 or A-2) pursuant to § 214.2(a)(2) of this chapter;

(2) An alien spouse or unmarried dependent son or daughter of an alien employee of the Coordination Council for North American Affairs (E-1) pursuant to § 214.2(e) of this chapter;

(3) A nonimmigrant (F-1) student who:

(i) Is seeking off-campus employment authorization due to economic necessity pursuant to § 214.2(f) of this chapter. A student authorized employment under this section may use a properly endorsed I-20 ID issued to the student to establish employment authorization pursuant to 8 CFR 274a.2(b)(1)(v)(C)(7). To constitute a proper endorsement for this section, the Form I-20 ID must contain the date until which employment is authorized; a statement that the hours authorized per week while school is in session may not exceed 20 hours weekly; the identifying number of the Service officer; and the date and location of the endorsement.

(ii) Is seeking employment for purposes of practical training (including curricular practical training) pursuant to § 214.2(f) of this chapter, provided the alien will be employed only in an occupation which is directly related to his or her course of studies. A student authorized employment under this section may use a properly endorsed I-20 ID issued to the student, to establish employment authorization pursuant to 8 CFR 274a.2(b)(1)(v)(C)(7). A properly endorsed Form I-20 ID must contain the date until which employment is authorized; the occupation or field in which employment is authorized; the name, title and signature of the designated school official or the identifying number of the Service officer; and the date and location of the endorsement; or

(iii) Has been offered employment under the sponsorship of an international organization within the meaning of the International Organization Immunities Act (59 Stat. 669), if such international organization provides written certification to the district director having jurisdiction over the intended place of employment that the proposed employment is within the scope of the organization's sponsorship;

(4) An alien spouse or unmarried dependent, child, son or daughter of an officer or employee of an international organization (G-1 or G-4) pursuant to § 214.2(g) of this chapter;

(5) An alien spouse or minor child of an exchange visitor (J-2) pursuant to § 214.2(j) of this chapter;

(6) A nonimmigrant (M-1) student seeking employment for practical training pursuant to § 214.2 (m) of this chapter following completion of studies if such employment is directly related to the student's course of study;

(7) A dependent of an alien classified as NATO-1 through NATO-7 pursuant to § 214.2(n) of this chapter;

(8) Any alien who has filed a non-frivolous application for asylum pursuant to Part 208 of this chapter. Employment authorization shall be granted in increments not exceeding one year during the period the application is pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date;

(9) Any alien who has filed an application for adjustment of status to lawful permanent resident pursuant to Part 245 of this chapter. Employment authorization shall be granted in increments not exceeding one year during the period the application is pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date;

(10) Any alien who has filed an application for suspension of deportation pursuant to Part 244 of this chapter, if the alien establishes an economic need to work. Employment authorization shall be granted in increments not exceeding one year during the period the application is pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date;

(11) Any alien paroled into the United States temporarily for emergent reasons or reasons deemed strictly in the public interest pursuant to § 212.5 of this chapter;

(12) Any deportable alien granted voluntary departure, either prior to or after hearing, for reasons set forth in § 242.5(a)(2) (v), (vi), or (viii) of this chapter may be granted permission to be employed for that period of time prior to the date set for voluntary departure including any extension granted beyond such date. Factors which may be considered in adjudicating the employment application of an alien who has been granted voluntary departure are the following:

(i) The length of voluntary departure granted;

(ii) The existence of a dependent spouse and/or children in the United States who rely on the alien for support;

(iii) Whether there is a reasonable chance that legal status may ensue in the near future; and

(iv) Whether there is a reasonable basis for consideration of discretionary relief.

(13) Any alien against whom exclusion or deportation proceedings have been instituted, who does not have a final order of deportation or exclusion, and who is not detained may be granted temporary employment authorization if the district director determines that employment is appropriate. Factors which may be considered by the district director in adjudicating the employment application of such an alien are the following:

(i) The existence of the economic necessity to be employed;

(ii) The existence of a dependent spouse and/or children in the United States who rely on the alien for support;

(iii) Whether there is a reasonable chance that legal status may ensue in the near future; and

(iv) Whether there is a reasonable basis for consideration of discretionary relief;

(14) An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment;

(15) A nonimmigrant alien within the class of aliens described in paragraphs (b)(2), (5), (8), (9), (10), (11), and (12) of this section whose application for extension of stay has not been adjudicated within the 120-day period as set forth in paragraph (b) (15) of this section.

(d) *Basic criteria to establish economic necessity.* Title 45—Public Welfare, Poverty Guidelines, 45 CFR 1060.2 should be used as the basic criteria to establish eligibility for employment authorization when the alien's economic necessity is identified as a factor. The alien shall submit an application for employment authorization listing his or her assets, income and expenses as evidence of his or her economic need to work. Permission to work granted on the basis of the alien's application for employment authorization may be revoked under § 274a.14 of this chapter upon a showing that the information contained in the statement was not true and correct.

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 103 and 109

Powers and Duties of Service Officers; Availability of Service Records; Employment Authorization; Excludable Deportable Aliens

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This final rule revises the regulations relating to the imposition of bond conditions against employment in the case of aliens who are placed in exclusion or deportation proceedings. Work authorization may be granted in certain instances, upon application by the alien. The decision to authorize employment will lie with the district director of the Service. The revisions will eliminate the present cumbersome procedures by which Regional Commissioners are authorized to impose bond conditions against employment.

EFFECTIVE DATE: December 7, 1983.

FOR FURTHER INFORMATION CONTACT: For General Information: Loretta J. Shogren, Director, Policy Directives and Instructions, Immigration and Naturalization Service, 425 Eye Street NW., Washington, D.C. 20536, Telephone: (202)633-3048.

For Specific Information: Robert J. Schmidt, Detention and Deportation Officer, Immigration and Naturalization Service, 425 Eye Street NW., Washington, D.C. 20536, Telephone: (202) 633-4120.

SUPPLEMENTARY INFORMATION: On March 2, 1983, a proposed rule was published in the Federal Register (48 FR 8820) to revise the regulations relating to work authorization of aliens apprehended or detained for immigration law violations. The proposed rule provided for revision of both 8 CFR Parts 103 and 109. The regulations up until the present have allowed an alien in deportation proceedings to work, unless a Regional Commissioner of the Service, upon recommendation by a district director, imposed a specific condition of release barring employment.

Under the final rule, only the district director will decide whether or not an alien in proceedings will be granted work authorization. In order to qualify for this privilege, the alien will have to apply for work authorization and establish that employment should be authorized at the discretion of the district director. The final rule contains factors which may be taken into account by the district director in considering employment authorization. The burden will be on the alien to establish that the authorization should be granted. Among the factors which may be considered are the presence of U.S. citizen or permanent resident relatives who were dependent on the alien for support, and the likelihood that the alien will qualify for some type of relief from deportation or exclusion.

Following publication of the proposed rule, a large number of comments were received. Critical comments may be roughly divided into five categories:

(1) That the rule went beyond the Service's statutory authority;

(2) That the rule would result in fewer bonds being written and more persons being detained;

(3) That the rule would impose significant hardships on citizens and permanent resident relatives and asylum seekers;

(4) That the proposed rule did not meet rule making standards as to determinations of economic impact under the Regulatory Flexibility Act or Executive Order 12291; and

(5) That the standards to be applied in granting employment authorization were unclear.

Of the criticisms, the first three represent a misinterpretation of the immigration law and the regulation itself.

These comments will be considered in sequence:

1. The comment that the rule went beyond the Service's statutory authority

Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252, authorizes the Attorney General to set conditions for release on bond. The standards applied must be reasonable. *Matter of Toscano-Rivas*, 14 I&N Dec. 523 (BIA 1972); (A.G. 1974). A reasonable condition is one that prohibits an alien under deportation or exclusion proceedings from working without authorization. Such unauthorized work is a continuing violation of the immigration laws. Unauthorized work is in direct contravention of one of the "dominant purpose(s) of the immigration laws" which is "to protect American workers," as one commenter conceded, although further characterizing this determination as a "legislative determination."

Many commenters contended that the no-work condition is contrary to the purpose of the appearance bond, which is to assure the appearance of the alien at a deportation or exclusion hearing. Most commenters who focused on this issue asserted that assuring appearance was the *only* purpose of the bond. The Attorney General in 1974 found otherwise:

It is generally agreed that a basic purpose of the immigration laws is to protect against the displacement of workers in the United States. Thus, under an approach similar to that used in *Earle*, [*Earle v. United States*, 254 F2d 384 (2 Cir. 1958); cert. denied, 358 U.S. 822 (1958)] it may be that section 103(a) and the Attorney General's broad authority to enforce the immigration laws afford an independent basis for requiring of persons subject to deportation proceedings bonds prohibiting unauthorized employment. Such bonds are frequently required of nonimmigrant aliens seeking either admission to the United States, or an extention of their stay. It may be proper to impose a similar requirement upon aliens who become subject to deportation proceedings. The result would be a bond serving two related but independent purposes. *Matter of Toscano-Rivas*, at 555.

It is clear from this that a bond condition barring unauthorized employment may have dual purposes. While it is true that most bond conditions are aimed at ensuring appearance of an alien, there does not appear to be any reason under Section 242 of the Act to limit conditions of release. For example, where a nonimmigrant visitor is apprehended for violating the conditions of his stay by working, it is entirely appropriate to impose, as a condition of release, a condition barring further unauthorized employment. If this is not done, upon release, the alien could simply continue his employment with impunity until a deportation hearing was scheduled and through the appeal process. There is no provision in the immigration law which mandates such a result.

A condition barring employment could, therefore, be used in tandem with a money bond whose purpose would be to insure the alien's appearance. The violation of a condition barring employment would not necessarily lead to a breach of the money bond, because the alien might appear even if he or she were violating the condition against unauthorized employment. Where the "no work" condition is violated, the appropriate response would be to take the alien into custody.

The argument that the Service would be using a *bond* for improper purposes, i.e., "no work," misses the point. It is not the bond which imposes "no work." Rather, "no work" is a condition of release, which, if violated, gives the Service the right to order the alien to surrender and appear. If the alien fails to appear following a breach of the condition of release, the Service may declare the bond to be in default, just as if the alien failed to appear at a scheduled court date. The bond requires the bonding company to pay (or the alien to forfeit a cash bond) upon the alien's unexcused failure to appear, either upon a date certain or upon an order to surrender following a breach of a condition of release. The Service is imposing "no work" as a condition of release, unless, of course, the alien applied to and received, from the district director, permission to work.

Most importantly, the regulation does not necessarily change the number of aliens ultimately allowed to work. In each case, if an alien desires to work, the response to the inquiry could be the same. There is just a different starting point. The person seeking to work will have the burden of going forth with the application to the district director, who is the party best able to consider that application.

Under this formulation, the comments made by many commenters to the effect that bonds could not be written if the alien did not work, were based, in part, on a fales premise. The premise was that violation of the "no work" condition would necessarily lead to bond breach.

2. The comment that the rule would result in fewer bonds being written and more aliens being detained

In considering whether to publish the proposed rule, Service officials were aware that bonding companies and other sureties might be affected by the rule. It was understood that in certain instances a bond might not be quite as attractive if a "no work" release condition were imposed. The possibility that a bonding company might require more collateral or charge higher premiums was also considered. As a corollary of these possibilities, it was also assumed that more aliens might have to be detained. This latter possibility was considered an acceptable consequence. In balance, it was decided that prevention of employment by illegal aliens and safeguarding of employment of U.S. citizens and permanent resident aliens were more important considerations than inconvenience to bonding companies or increased detention costs.

3. The comment that the rule would impose significant hardships on citizens and permanent resident aliens and asylum seekers

These comments failed to take into account the fact that the proposed rule specifically provided protections for persons in these categories. In the first instance, permanent resident aliens are not affected by these release conditions. Until such time as permanent resident status is lost, the permanent resident

alien has the right to work in the United States, if released on bond. The Service, therefore, has no intention of applying this condition to a permanent resident alien in exclusion or deportation proceedings.

The regulation also allows a district director to take permanent resident and U.S. citizen relatives into account when considering an application for employment authorization. If the alien in proceedings supports such relatives, employment may be authorized.

Aliens who have applied for asylum will not be affected by these regulations. Employment is governed by 8 CFR Part 208. Those provisions allow a district director to authorize employment for an asylum applicant who has filed a non-frivolous asylum application.

4. The criticism that the proposed rule did not meet rule making standards relating to economic impact determinations under the Regulatory Flexibility Act or Executive Order 12291

A. *Executive Order 12291.* A large number of commenters stated that the proposed rule was a "major rule" under Executive Order 12291 because of its effect on bonding agencies, aliens and their families, the Service, and State and local governments. The gist of the criticisms was that a no-work condition would result in no bonds being written because bonding companies would not bond unemployed aliens. As a consequence, aliens would have to be detained, or the alien would be released and have to be supported at public expense, along with the alien's family.

Under the Executive Order, a "Regulatory Impact Analysis and Review" is required for every "major

rule." This includes a rule which is likely to result in "A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions." If the rule is "likely" to result in these consequences, then a detailed analysis must be undertaken, following the prescribed format, and transmitted to OMB.

The discussions surrounding the decision to publish the proposed rule included consideration of the effects of the new procedures on various parties. The impact of the rule on bonding companies was considered. The conclusion was that the number of companies affected, and the adverse effects they might feel as a result of the no-work rider provision, were quite limited. Other adverse effects, such as possible increased welfare costs if aliens were denied work authorization, were thought to be minimal, because it was anticipated that allowances would be made for work authorization for aliens with citizen or permanent resident dependents or other substantial equities. Because the discussions revealed no major impact on any segment of the public, the rule as contemplated was not a "major rule" and therefore not subject to an impact review and analysis.

B. *5 U.S.C. 603 requires a "regulatory flexibility analysis"*. Many commenters cited the Administrative Procedures Act (APA) in criticizing the proposed rule. Under this provision, an agency is required, before publishing a notice of proposed rule making, to "prepare and make available for public comment an initial regulatory flexibility analysis." This analysis is published with the notice of proposed rule making.

This analysis is not required if the head of the agency certifies, pursuant to 5 U.S.C. 553(f), that

the rule will not have a significant economic effect on any "substantial number" of small businesses, organizations or governments. The Commissioner in fact made this certification.

In the period prior to the publishing of the proposed rule, the Service engaged in a good deal of internal discussion relating to both the content and the effect of the proposed rule. The decision to publish the rule was made after conversations among the Regional Commissioners and the Central Office Management. It was apparent during these deliberations that certain bonding companies might not consider the proposed rule to be in their best interest. It was also understood that the number of companies involved in immigration bond writing was quite small.

The claims made regarding adverse effects on governmental units fail to take into account the definitions contained in the regulatory flexibility provisions. It is not necessary for an agency to take into acount costs to the Federal or State governments. The analysis by its clear terms applies to "small governmental jurisdictions" such as cities, counties, towns and villages, with a population of less than 50,000 persons (5 U.S.C. 601). None of the commenters seemed aware of the scope of the flexibility analysis in these terms. The costs the commenters project are thus based on faulty assumptions.

It is our conclusion that criticisms of the rule making procedures as they relate to the regulatory flexibility analysis are basically flawed because of the misconceptions as to the applicability of the provisions. In addition, it is our position that we made an "initial regulatory flexibility analysis" during consideration of the rule making and that the management level discussions on this topic were sufficient, although not reduced to formal studies or writings.

5. The criticism that the standards to be applied in granting employment authorization were unclear

Some of the commenters provided useful criticisms of the factors to be considered in adjudicating a request for employment authorization. In particular, they questioned whether the Service had the authority to consider "dislocation" of American workers and the "impact" of such employment. Several commenters described this as more appropriately a function of the Department of Labor. These criticisms have substance to them. "Dislocation" is a term difficult to define and quantify. This factor is deleted from the final rule.

Factor (C) of the proposed rule, the "number of aliens involved" in unauthorized employment, was criticized because it did not specify if it referred to a particular industry or to the work force as a whole. It was also criticized as being part of the "dislocation" and "impact" determinations more suitably made by the Department of Labor. This factor is deleted from the final rule.

One commenter stated that two other factors of the proposed rule appeared to be contradictory: Factor (F), the "recentness" of the alien's arrival, and factor (G), the acceptance of employment "shortly after the alien's arrival." The commenter suggested that a long-term resident may have taken employment shortly after arrival, and inquired as to which factor would take precedence. Because of the ambiguity surrounding these factors, and because they are not essential considerations, they have been deleted from the final rule.

Comments on factors (H) and (I) were mixed. These factors are in the final rule, as they are important factors in the fair consideration of employ-

ment requests, and have been used in the general employment authorization regulations contained in 8 CFR 109.1(b).

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegation (Government Agencies), Bonding, Bonds, Surety bonds.

8 CFR Part 109

Aliens, Employment.

Accordingly, Title 8, Chapter I of the Code of Federal Regulations is amended as follows:

PART 103—POWER AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

1. In § 103.6, paragraph (a)(2) is revised to read as follows:

§ 103.6 Surety bonds.

(a) * * *

(2) *Bond riders*—(i) *General.* Bond riders shall be prepared on Form I-351 and attached to Form I-352. If a condition to be included in a bond is not on Form I-351, a rider containing the condition shall be executed.

(ii) *Condition against unauthorized employment.* A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the

District Director determines that employment is appropriate.

(iii) *Factors to be considered.* Only those aliens who upon application under § 109.1(b) of this chapter establish compelling reasons for granting employment authorization may be authorized to accept employment. Among the factors which may be considered when an application is made, are the following:

(A) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;

(B) Prior immigration violations by the alien;

(C) Whether there is a reasonable basis for considering discretionary relief; and

(D) Whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities exist.

* * * * *

PART 109—EMPLOYMENT AUTHORIZATION

2. In § 109.1, a new paragraph (b)(8) is added to read as follows:

§ 109.1 Classes of aliens eligible.

* * * * *

(b) * * *

(8) An excludable or deportable alien who has posted an appearance and delivery bond may be granted temporary employment authorization if the District Director determines that employment is appropriate under § 103.6(a)(2)(iii) of this chapter.

* * * * *

(Sec. 103 of the Immigration and Nationality Act, as amended (8 U.S.C. 1103))

Dated: October 12, 1983.

Alan C. Nelson,

Commissioner, Immigration and Naturalization.

[FR Doc. 83-30061 Filed 11-4-83; 8:45 a.m.]

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